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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUBOWITZ, ETC., PETITIONER,

vs.

HILTON HOTELS CORPORATION, ET AL

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 20, 1965

CERTIORARI GRANTED OCTOBER 11, 1965

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APPENDIX.

6 IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

Dora Surowitz, individually and on
behalf of all other similarly
situated shareholders of Hilton
Hotels Corporation,

Plaintiff,

vs.

Hilton Hotels Corporation, a cor-
poration, Conrad N. Hilton, Rob-
ert P. Williford, Robert J. Cav-
erly, Joseph P. Binns, Spearl
Ellison, Henry Crown, Horace C.
Flanigan, Benno M. Bechhold, Y.
Frank Freeman, Willard W.
Keith, Lawrence Stern, Sam D.
Young, Fritz B. Burns, Vernon
Herndon, Herbert C. Blunck,
Charles L. Fletcher, Robert A.
Groves, Joseph A. Harper, Bar-
ron Hilton, and Hilton Credit
Corporation, a corporation,

Defendants.

Civil Action
No. 63-C-2248
Equitable Relief
Requested.

COMPLAINT.

Count I.

Plaintiff complains of the defendants, except the de-
fendant Hilton Credit Corporation, and each of them, as
follows:

1. Plaintiff Dora Surowitz resides in and is a citizen

of the State of New York and is currently, and at all
7 times during the years 1962 and 1963 pertinent hereto
has been, a holder and owner of shares of \$2.50 par
value common stock of defendant Hilton Hotels Corpora-
tion, which stock is registered and listed on and traded over
the New York and Pacific Coast Stock Exchanges. Plain-
tiff brings this action to enforce rights of the defendant
Corporation, Hilton Hotels Corporation, on her own behalf
and on behalf of the other approximately 12,000 holders
of common stock of the Corporation. This action is not
a collusive one to confer jurisdiction on this Court.

2. Defendant Hilton Hotels Corporation is a Delaware
corporation which maintains its principal place of busi-
ness and its executive offices in Chicago, Illinois; said de-
fendant transacts business in the Northern District of
Illinois. The Corporation has approximately 12,000 stock-
holders. Defendant Hilton Hotels Corporation owns and
operates a large number of hotels and inns in various
states in the United States and also in foreign countries.

3. For a period of time prior to December 17, 1962 and
to and including the present time, and all times relevant
to the matters alleged herein, each of the individual defend-
ants was and now is an officer or director, or both an
officer and director, of defendant Hilton Hotels Corpora-
tion, and collectively said individual defendants as
8 officers, directors, and stockholders, controlled and now
control the affairs of the defendant Hilton Hotels Cor-
poration. The individual defendants were and are officers
or directors, or both, of defendant Hilton Hotels Corpora-
tion, as follows:

Conrad N. Hilton, Director, Chairman of the Board,
and President.

Robert P. Williford, Director, Vice Chairman of the
Board.

Robert J. Caverly, Director, Executive Vice President.

Joseph P. Binns, Director, Senior Vice President.
Spearl Ellison, Director, Senior Vice President.
Henry Crown, Director, Vice President.
Horace C. Flanigan, Director.
Benno M. Bechhold, Director.
Y. Frank Freeman, Director.
Willard Keith, Director.
Lawrence Stern, Director.
Sam D. Young, Director.
Fritz B. Burns, Director.
Vernon Herndon, Senior Vice President.
Herbert C. Blunck, Vice President.
Charles L. Fletcher, Vice President and Treasurer.
Robert A. Groves, Vice President.
Joseph A. Harper, Vice President.
Barron Hilton, Vice President.

9 Defendant Conrad N. Hilton, in addition to being an officer and director, is the largest single holder of shares of common stock in the defendant Corporation, holding approximately twenty-three per cent of the outstanding shares.

4. The claim herein pleaded arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and the Rules of the Securities and Exchange Commission adopted thereunder. Section 10(b) of the Securities Exchange Act of 1934 reads as follows:

Sec. 10. It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • • • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Rules adopted by the Securities Exchange Commission under Section 10 of the Act of 1934 reads as follows:

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality
10 of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

5. Jurisdiction of this matter is conferred on this Court by Section 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U. S. C. § 1337.

6. In December of 1962 and January of 1963, the individual defendants, as the officers and directors having control over the affairs of the defendant Hilton Hotels Corporation, caused the defendant Corporation to issue a document entitled "Letter of Transmittal", a document entitled "Offer", a document modifying said offer entitled "Notice", and a letter to be transmitted through the United States mails to the shareholders of defendant Hilton Hotels Corporation, including plaintiff, wherein the defendant Corporation, for a limited period of time and under certain
11 specified conditions, offered to purchase 300,000 shares of its outstanding \$2.50 par value common stock at

a price or prices between \$28.125 and \$29.50 per share. True and correct copies of the documents mentioned above, namely the Letter of Transmittal dated December 17, 1962, the Offer dated December 17, 1962, and the Notice dated January 7, 1963, and the letter dated January 7, 1963, are attached hereto and made a part hereof by reference thereto as Exhibits "A", "B", "C", and "D", respectively.

7. In making the offer above described, the individual defendants stated in writing, in the Offer of December 17, 1962 (Exhibit "B" attached hereto), which document was transmitted through the United States mails to shareholders of the defendant Corporation, the reason why the offer was being made, as follows:

"The purpose of Hilton in making this offer is to re-purchase a portion of the Common Stock of this corporation equal to the number of shares heretofore issued in connection with the acquisition of certain properties, which properties are no longer owned by this corporation."

No other statement of reasons appears in any of the above-designated documents.

8. Said explanation was false and misleading, and was known by the individual defendants to be false and misleading, in the respects indicated hereinafter. Said false and misleading statement, the offer to purchase 300,000 shares of common stock described above, and the documents specified above which were sent out by the individual defendants to the shareholders were integral parts of a manipulative and deceptive device or contrivance and of a scheme to defraud, and constituted acts and practices carried out in the course of the execution of such device and scheme, all in violation of the provisions of Section 10(b) of the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission promulgated thereunder, in that—

(a) The individual defendants were engaged in a plan and scheme to make it possible for defendant Conrad N. Hilton and other officers and directors to dispose of shares in the defendant Corporation at prices more favorable than they could obtain in the market, at a time when they knew or should have known that the business affairs of the defendant Corporation would shortly lead to a substantial drop in the value of the shares. Furthermore, the individual defendants were engaged in a plan and scheme to make it possible for defendant Henry Crown to dispose of large holdings in the common stock of the defendant Corporation held by him individually, by other entities controlled by him, by members of his family, and by trusts established for various members of his family, as to some of which he was grantor, beneficiary, or remainderman, at prices above the market prices for such stock, under circumstances whereby such disposal of stock would not become publicly known.

- 13 (b) The individual defendants acted in such a way as to conceal from the defendant Corporation and from its stockholders the true purpose of the offer to purchase described above, and in such a way as to make it appear that it was to the Corporation's advantage to effect such a purchase of approximately 10 per cent of its outstanding shares. In fact, such a purchase was contrary to the defendant Corporation's interest, since the effect of it was to reduce working capital by approximately \$8,564,000 at a time when the Corporation's debts and commitments were increasing. By the end of 1962 the Corporation's long-term debt, on a consolidated basis, amounted to more than \$133,000,000 and exceeded the amount of long-term debt at the end of 1961 by more than \$50,000,000. By the end of 1962, the Corporation had invested more

than \$197,000,000 in properties, plant, and equipment, or almost \$50,000,000 over and above its investment at the end of 1961 after subtracting dispositions and depreciation during the year. By the end of 1962, the Corporation had outstanding construction commitments in excess of \$15,000,000. The Corporation also had issued guarantees on various obligations and transactions exposing itself to possible liabilities in excess of \$20,000,000. By the end of 1962 the current assets
14 of the Corporation had been reduced by \$9,500,000 compared to year-end 1961, while current liabilities had increased by more than \$2,500,000. Furthermore, the Corporation, at the end of 1962, announced plans to invest an additional \$21,000,000 in new properties during 1963. These facts negated any pretense of contraction of activities and of a corporate need to eliminate the Corporation's own outstanding stock by using allegedly excess funds not required in the business.

(c) The individual defendants represented that the shares to be purchased were equal in number to shares previously issued in connection with certain properties no longer owned by the defendant Corporation. In fact, however, the number of shares outstanding in December 1962 which were properly countable as shares previously issued for the acquisition of properties thereafter disposed of did not exceed approximately 150,000 shares, not 300,000 shares as represented by the individual defendants. During a period of years prior to 1962 the Corporation had followed a practice of purchasing its own stock by means of regular market transactions on the stock exchanges; at the end of 1962 the Corporation had in this way acquired almost 700,000 shares of its own common stock, which was held as treasury stock.

- (d) The individual defendants represented that "the closing price of [the Corporation's] stock on the New York Stock Exchange at the close of business on the date preceding this offer was \$28.125" and described this figure as the "current market price". The individual defendants therefore indicated that tenders of shares could be made at any price between \$28.125 and \$29.50 per share. Said representation was misleading in that the individual defendants omitted to disclose that they had engaged in acts and transactions, including the purchases of shares and transmission or "leaking" of information about the tender prices, designed to peg, fix, rig, and artificially inflate the price of the stock, in order to achieve temporarily, in the period of time immediately prior to December 17, 1962, a price on the market at the lower end of the scale of prices the individual defendants proposed to use for the purposes of their scheme and plan. During the first quarter of 1962, the price per share of the Corporation's common stock in stock exchange transactions ranged from \$29½ to 33½; during the second quarter, the range was 23½ to 30¾; during the third quarter, the range was \$23 to \$25½; and during October and November, 1962, the range was \$22 to \$25½. For the six-month period prior to December 17, 1962, the price of the defendant Corporation's stock exceeded \$28 per share on only two trading dates, one on December 14, 1962, and the other, two days earlier. During the month prior to December 10, 1962, the price of the stock did not even momentarily reach \$27 per share. After consummation of the scheme and plan on January 24, 1963, the price of the stock dropped steadily over several months to a current price of \$15½ to \$16 per share.

(e) In making said representations, the individual

defendants did not disclose that financial information available to them as officers and directors made it apparent that the earnings of the defendant Corporation were declining and that, at subsequent public announcements of relevant financial information of the Corporation, the market price of the defendant Corporation's shares was most likely to fall by reason of reduced earnings. Operating profits for 1962 were less than 80% of operating profits for 1961, and in fact were the lowest such profits since 1954. Thereafter, profits for the first quarter of 1963 were approximately 40% below profits for the first quarter of 1962.

(f) The letter of January 7, 1963 (Exhibit "D" attached hereto), which accompanied the Notice of the amendment of the original offer, said Notice being dated January 7, 1963 (Exhibit "C" attached hereto), was deliberately written for the purpose of leading the shareholders of the defendant Corporation into the false belief that the Corporation was prospering, that its prospects were good, and that various financial transactions mentioned therein were constantly improving its position, earnings, etc. Said letter was intended to create a false sense of well-being, thereby to induce shareholders to believe that the officers and directors of the defendant Corporation, including the individual defendants, were acting wisely and in the interests of the Corporation in causing the Corporation to purchase 300,000 shares, and thereby allaying concern over the disposition of shares by the individual defendants. Said letter was further designed falsely to make it appear that the defendant Corporation would in fact be harmed and its interests prejudiced if enough shares, including shares of officers and directors, were not tendered to make it possible to purchase 300,000 shares.

(g) The Notice dated January 7, 1963 (Exhibit "C" attached hereto), which advised the shareholders of certain modifications in the original offer of December 17, 1962 (Exhibit "B" attached hereto), contained the following statement:

"2. Mr. Conrad N. Hilton, Chairman of the Board, President, and the principal shareholder of the corporation, has advised the corporation that he will tender 85,847 shares of common stock pursuant to the terms of the Offer, which is the number of shares of common stock he may have been required to tender under the terms of the Offer."

18 Said statement was false and misleading, and was known to the individual defendants to be false and misleading, in that it advised the shareholders that defendant Conrad N. Hilton, although entitled to offer more than ten per cent of his stockholdings by virtue of the January 7, 1963 amendment to the offer, would still offer only ten per cent, namely, 85,847 shares. In fact, the total of 85,847 shares was in excess of ten per cent of the holdings of defendant Conrad N. Hilton on January 7, 1963 and on December 17, 1962. Said statement was further false and misleading in that it did not disclose that defendant Conrad N. Hilton had agreed to purchase over 101,000 shares from defendant Henry Crown, from entities controlled by defendant Crown, from members of defendant Crown's family, and from trusts for the benefit of members of defendant Crown's family. Failure to disclose this circumstance helped to conceal the extent to which the plan and scheme and its implementation were intended to inure to the benefit of defendant Henry Crown and his family.

(h) The defendants Conrad N. Hilton and Henry

Crown, and the family interests of Henry Crown, could not have otherwise sold the stock which was disposed of by them pursuant to the defendant Corporation's offer except by a secondary public offering, with all of the high costs attendant thereupon, with full disclosure of material facts to the public by way of registration in conformity to the federal security laws and rules and regulations, at a price far below the tender range of the defendant Corporation's offer, and at a time when the market for public offerings was unfavorable. It was the purpose and intent of the individual defendants, by their illegal plan, scheme, and contrivance, to avoid any such disadvantageous consequences to their own personal interests.

9. As the result of said manipulative and deceptive device and scheme, and its carrying out pursuant to the false and misleading representations and deceptive actions specified above, the defendant Corporation was caused by the individual defendants to purchase a total of 300,000 shares of its common stock for a total price of \$8,564,245.81. Included in said shares were at least 101,650 shares purchased, by the use of the United States mails and other means of transportation and communication in interstate commerce, from the officers and directors of the defendant Corporation, including shares from the individual defendants as follows:

| | |
|--------------------------|--------|
| Conrad N. Hilton..... | 85,847 |
| Sam D. Young..... | 353 |
| Vernon Herndon | 1,147 |
| Herbert C. Blunck..... | 393 |
| Charles L. Fletcher..... | 4,100 |
| Robert A. Groves..... | 6,000 |
| Joseph A. Harper..... | 2,150 |

The shares sold by defendant Conrad N. Hilton were in excess of ten per cent of the shares he owned on December

17, 1963. The shares sold by the other above-named
20 individual defendants (excluding Conrad N. Hilton)
constituted, in the aggregate, approximately 43 per
cent of the shares they owned on December 17, 1963. The
shares disposed of by defendant Henry Crown and mem-
bers of his family and by trusts for the benefit of defend-
ant Henry Crown and relatives of defendant Crown, both
directly through sales to the defendant Corporation pur-
suant to the offer described above and indirectly through
a sale to defendant Conrad N. Hilton (who in turn sold
most of the Crown shares so acquired to the defendant
Corporation pursuant to the offer) amounted to substan-
tially in excess of 50 per cent of the total shares held by
defendant Henry Crown and members of his family and
trusts in which he or members of his family were inter-
ested as grantors, beneficiaries, or remaindermen as of
December 17, 1962. At all times between December 17,
1962 and January 24, 1963, defendants Conrad N. Hilton
and Henry Crown and all the other individual defendants
knew or had reason to know, on the basis of financial in-
formation relating to the operations of defendant Hilton
Hotels Corporation available to them as directors and
officers, that the market value of the common stock of the
defendant Corporation would in all likelihood fall rapidly
in the year 1963 to levels far below the \$28.125 to \$29.50
range of prices set forth in the offer.

10. The scheme and plan outlined in the documents
(Exhibits "A", "B", "C" and "D" attached hereto)
21 sent to the shareholders in the manner described above
was further devised to enable the individual defend-
ants to defraud the defendant Corporation and the share-
holders thereof, in that it specified that tenders of shares
could be made at a range of prices from \$28.125 per share
to \$29.50 per share. Said individual defendants were in
a position to advise themselves and did inform themselves,

on a day-to-day or hour-to-hour basis, precisely as to how many shares had been tendered and at what prices. Thus, the terms of the plan for the purchase by the defendant Corporation of 300,000 shares were deliberately contrived and availed of to insure the success of the individual defendants in disposing of the number of shares they wished to dispose of. Defendant Conrad N. Hilton informed the defendant Corporation on or before January 7, 1963 that he would tender 85,847 shares. All of said shares were in fact purchased by the defendant Corporation. Defendant Conrad N. Hilton tendered them at a price which, on the basis of the prices at which other shares were offered, he knew would result in his shares being purchased as part of the 300,000 shares to be acquired by the defendant Corporation. Tenders by many stockholders other than the individual defendants were rejected because those stockholders were underbid by the insiders, including specifically, the individual defendants who tendered shares to the defendant Corporation.

22 11. At all times relevant to the matters alleged herein, the individual defendants, and each of them, as officers and directors of the defendant Hilton Hotels Corporation, owed a fiduciary duty to said Corporation and to its shareholders, and said fiduciary obligation required that the officers and directors protect, preserve, and advance the welfare of the defendant Corporation and its shareholders, act in the best interests of the Corporation and its shareholders, and refrain from acts and doings whereby the personal benefit of the directors and officers, or any one or more of them, would be enhanced to the detriment of the defendant Corporation and its shareholders.

12. Contrary to their fiduciary duty and obligation, the individual defendants engaged in the scheme and plan and deceptive devices and practices set forth above, all in vio-

lation of Section 10(b) of the Securities Exchange Act of 1934 and the Rules and Regulations promulgated thereunder by the Securities and Exchange Commission, for the purpose of advancing their own personal interests, and particularly the personal financial interests of defendants Conrad N. Hilton and Henry Crown, at the expense of the defendant Corporation and its shareholders. By such 23 illegal and fraudulent means, the individual defendants caused the defendant Corporation to pay out and waste corporate funds in excess of \$8,564,000, of which total the individual defendants personally took and received approximately \$2,890,000. To the extent of \$8,564,000 the defendant Corporation has been defrauded, and to the extent of \$2,890,000 said defrauding of the defendant Corporation has directly benefited the individual defendants.

13. No demand has been made on the defendant Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

14. The above-described device, scheme, and plan was carried out and put into effect by the individual defendants by and through the use of the United States mails 24 and other means of communication and transmission of information in interstate commerce, including the telephone.

Wherefore, plaintiff prays that judgment be entered against the individual defendants, jointly and severally, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of their illegal acts in violation of Section 10(b) of the Securities and Exchange Act of 1934 and the Rules and Regulations promulgated thereunder, namely, in the amount of \$8,654,245.81, together with interest thereon from January 24, 1963, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

25

Count II.

Plaintiff complains of the defendants, except the defendant Hilton Credit Corporation, and each of them, as follows:

1.-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

4. The claim herein pleaded arises under Section 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a) which reads as follows:

Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the

statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

5. Jurisdiction of this matter is conferred on this Court by Section 22 of the Securities Act of 1933, 15 U. S. C. Section 77z; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U. S. C. Section 1337.

6.-14. Plaintiff realleges paragraphs 6 to 14 inclusive of Count I as paragraphs 6 to 14 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

Wherefore, plaintiff prays that judgment be entered against the individual defendants, jointly and severally, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of their illegal acts in violation of Section 17(a) of the Securities Act of 1933, namely in the amount of \$8,654,245.81, together with interest from January 25, 1963, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

27

Count III.

Plaintiff complains of the defendants, except the defendant Hilton Credit Corporation, and each of them, as follows:

1.-3. Plaintiff réalleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

4. The claim herein pleaded arises under Sections

9(a) (4) and 9(e) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 77i(4) and 77e which read as follows:

Sec. 9. (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

5.-7. Plaintiff realleges paragraphs 5 to 7 inclusive of Count I as paragraphs 5 to 7 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

8. Said explanation was false and misleading, and was known by the individual defendants to be false and misleading, in respects indicated hereinafter. Said false and misleading statement, as well as other false and misleading statements contained in the documents (Exhibits "A", "B", "C" and "D") which are hereinafter specifically set forth, were integral parts of a plan and scheme designed to cause the defendant Corporation to purchase shares of stock and to deceive the shareholders, other than the individual defendants, into falsely believing that the purchase of 300,000 shares of stock by the Corporation would inure to the benefit of the Corporation, all in violation of Sections 9(a) (4) and 9(e) of the Securities Exchange Act of 1934, in that:

(a) The individual defendants represented that the shares to be purchased were equal in number to shares previously issued in connection with certain properties no longer owned by the defendant Corporation. In fact, however, the number of shares outstanding in December 1962 which were properly countable as shares previously issued for the acquisition of properties thereafter disposed of did not exceed approximately 150,000 shares, not 300,000 shares as represented by the individual defendants.

(b) The individual defendants represented that "the closing price of [the Corporation's] stock on the New York Stock Exchange at the close of business on the date preceding this offer was \$28.125" and described this figure as the "current market price". The individual defendants therefore indicated that tenders of shares could be made at any price between \$28.125

and \$29.50 per share. Said representation was misleading in that the individual defendants omitted to disclose that they had engaged in acts and transactions, including the purchases of shares and transmission or "leaking" of information about the tender prices, designed to peg, fix, rig, and artificially inflate the price of the stock, in order to achieve, temporarily, in the period immediately prior to December 17, a price on the market at the lower end of the scale of prices the individual defendants proposed to use for the purposes of their scheme and plan. During the first quarter of 1962, the price per share of the Corporation's common stock in stock exchange transactions ranged from \$29 $\frac{3}{4}$ to \$33 $\frac{1}{2}$; during the second quarter, the range was \$23 $\frac{1}{4}$ to \$30 $\frac{3}{4}$; during the third quarter, the range was \$23 to \$25 $\frac{1}{2}$; and during October and November, 1962, the range was \$22 to \$25 $\frac{1}{4}$. For the six-month period prior to December 17, 1962, the price of the defendant Corporation's stock exceeded \$28 per share on only two trading dates, one on December 14, 1962, and the other, two days earlier. During the month prior to December 10, 1962, the price of the stock did not even momentarily reach \$27 per share. After consummation of the scheme and plan on January 24, 1963, the price of the stock dropped steadily over several months to a current price of \$15 $\frac{1}{2}$ to \$16 per share.

(c) In making said representations, the individual defendants did not disclose that financial information available to them as officers and directors made it apparent that the earnings of the defendant Corporation were declining and that, at subsequent public announcements of relevant financial information of the Corporation, the market price of the Corporation's shares was most likely to fall by reason of reduced

earnings. Operating profits for 1962 were less than 80% of operating profits for 1961, and in fact were the lowest such profits since 1954. Thereafter, profits for the first quarter of 1963 were approximately 40% below profits for the first quarter of 1962.

(d) The letter of January 7, 1963 (Exhibit "D" attached hereto), which accompanied the Notice of the amendment of the original offer, said Notice being dated January 7, 1963 (Exhibit "C" attached hereto), was deliberately written for the purpose of leading the shareholders of the defendant Corporation into the false belief that the Corporation was prospering, that its prospects were good, and that various financial transactions mentioned therein were constantly improving its position, earnings, etc. Said letter was
32 intended to create a false sense of well-being, thereby to induce shareholders to believe that the officers and directors of the defendant Corporation, including the individual defendants, were acting wisely and in the interests of the Corporation in causing the Corporation to purchase 300,000 shares, and thereby allaying concern over the disposition of shares by the individual defendants. Said letter was further designed falsely to make it appear that the defendant Corporation would in fact be harmed and its interests prejudiced if enough shares, including shares of officers and directors, were not tendered to make it possible to purchase 300,000 shares.

(e) The Notice dated January 7, 1963 (Exhibit "C" attached hereto), which advised the shareholders of certain modifications in the original offer of December 17, 1962 (Exhibit "B" attached hereto), contained the following statement:

"2. Mr. Conrad N. Hilton, Chairman of the Board, President, and the principal shareholder of

the corporation, has advised the corporation that he will tender 85,847 shares of common stock pursuant to the terms of the Offer, which is the number of shares of common stock he may have been required to tender under the terms of the offer."

33 Said statement was false and misleading, and was known to the individual defendants to be false and misleading, in that it advised the shareholders that defendant Conrad N. Hilton, although entitled to offer more than ten per cent of his stockholdings by virtue of the January 7, 1963 amendment to the offer, would still offer only ten per cent, namely 85,847 shares. In fact, the total of 85,847 shares was in excess of ten per cent of the holdings of defendant Conrad N. Hilton on January 7, 1963 and on December 17, 1962. Said statement was further false and misleading in that it did not disclose that defendant Conrad N. Hilton had agreed to purchase over 101,000 shares from defendant Henry Crown, from entities controlled by defendant Crown, from members of defendant Crown's family, and from trusts for the benefit of members of defendant Crown's family. Failure to disclose this circumstance helped to conceal the extent to which the plan and scheme and its implementation were intended to inure to the benefit of defendant Henry Crown and his family.

9. As the result of the foregoing false and misleading representations, the defendant Corporation was caused by the individual defendants to purchase a total of 300,000 shares of its common stock at a total price of \$8,564,245.81. Included in said shares were at least 101,650 shares purchased, by the use of the United States mails and other
34 means of transportation and communication in interstate commerce, from the officers and directors of the

defendant Corporation, including shares from the individual defendants as follows:

| | |
|-------------------------------|--------|
| Conrad N. Hilton | 85,847 |
| Sam D. Young | 353 |
| Vernon Herndon | 1,147 |
| Herbert C. Blunck | 393 |
| Charles L. Fletcher | 4,100 |
| Robert A. Groves | 6,000 |
| Joseph A. Harper | 2,150 |

Out of the \$8,564,245.81 paid by the Corporation, the individual defendants personally took and received approximately \$2,890,000.

10. No demand has been made on the defendant Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

35 11. The above-described device, scheme, and plan was carried out and put into effect by the individual defendants by and through the use of the United States mails and other means of communication and transmission of information in interstate commerce, including the telephone.

Wherefore, plaintiff prays that judgment be entered against the individual defendants, jointly and severally, for the damages sustained by the defendant Hilton Hotels

Corporation by virtue of their illegal acts in violation of Sections 9(a)(4) and 9(e) of the Securities Act of 1933, namely in the amount of \$8,564,245.81, together with interest thereon from January 25, 1963, that plaintiff be awarded her costs, and the plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

36

Count IV.

Plaintiff complains of the defendants Conrad N. Hilton, Sam D. Young, Vernon Herndon, Herbert C. Blunck, Charles L. Fletcher, Robert A. Groves and Joseph A. Harper, and of the defendant Hilton Hotels Corporation, as follows:

1-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count precisely as though said paragraphs were set out in full herein.

4. The claim herein pleaded arises under Section 12(2) of the Securities Act of 1933, 15 U. S. C. Section 771(2), which reads as follows:

Sec. 12. Any person who—

(2) offers or sells a security (whether or not exempted by the provisions of Section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation of communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did

not know, and in the exercise of reasonable care could not have known, of such untruth or omission shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the
37 amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

5. Jurisdiction of this matter is conferred on this Court by Section 22 of the Securities Act of 1933, 15 U. S. C. Section 77z; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U. S. C. Section 1337.

6.-7. Plaintiff realleges paragraphs 6 and 7 of Count I as paragraphs 6 and 7 of this Count precisely as though said paragraphs were set out in full herein.

8. The various communications made to the defendant Corporation's shareholders, and referred to herein as Exhibits "A", "B", "C" and "D", contain both untrue statements and statements which were misleading because of their failure to state certain material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading. Said untruths and omissions, which were known to the individual defendants but not to the other shareholders of defendant Corporation, were caused to be communicated by the individual defendants to the Corporation's shareholders in order to enable certain of said individual defendants to dispose of large amounts of the Corporation's common stock at prices
above the market price by selling said stock to the de-
38 fendant Corporation. Said sales were in violation of the provisions of Section 12(2) of the Securities Act of 1933 in that:

(a) The individual defendants were engaged in a plan and scheme to make it possible for defendant

Conrad N. Hilton and other officers and directors to dispose of shares in the defendant Corporation at prices more favorable than they could obtain in the market, at a time when they knew or should have known that the business affairs of the defendant Corporation would shortly lead to a substantial drop in the value of the shares. Furthermore, the individual defendants were engaged in a plan and scheme to make it possible for defendant Henry Crown to dispose of large holdings in the common stock of the defendant Corporation held by him individually by other entities controlled by him, by members of his family, and by trusts established for various members of his family, as to some of which he was grantor, beneficiary, or remainderman, at prices above the market prices for such stock, under circumstances whereby such disposal of stock would not be known publicly.

(b) The individual defendants acted in such a way as to conceal from the mass of its stockholders the true purpose of the offer to purchase described above, and in such a way as to make it appear that it was to the Corporation's advantage to effect such a purchase of approximately 10 per cent of the outstanding shares. In fact, such a purchase was contrary to the defendant Corporation's interest since the effect of it was to reduce working capital by approximately \$8,564,000 at a time when the Corporation's debts and commitments were increasing. By the end of 1962 the Corporation's long-term debt, on a consolidated basis, amounted by more than \$133,000,000 and exceeded the amount of long-term debt at the end of 1961 by more than \$50,000,000. By the end of 1962, the Corporation had invested more than \$197,000,000 in properties, plant, and equipment, or almost \$50,000,000 over and above its investment at the end of 1961 after subtract-

ing dispositions and depreciation during the year. By the end of 1962, the Corporation had outstanding construction commitments in excess of \$15,000,000. The Corporation also had issued guarantees on various obligations and transactions exposing itself to possible liabilities in excess of \$20,000,000. By the end of 1962 the current assets of the Corporation had been reduced by \$9,500,000 compared to year-end 1961, while current liabilities had increased by more than \$2,500,000. Furthermore, the Corporation, at the end of 1962, announced plans to invest an additional \$21,000,000 in new properties during 1963. These facts negated any pretense of contraction of activities and of a corporate need to eliminate the Corporation's own outstanding stock by using allegedly excess funds not required in the business.

(c) The individual defendants represented that the shares to be purchased were equal in number to shares previously issued in connection with certain properties no longer owned by the defendant Corporation. In fact, however, the number of shares properly countable as shares previously issued for the acquisition of properties thereafter disposed of did not exceed approximately 150,000 shares, not 300,000 shares as represented by the individual defendants.

(d) The individual defendants represented that "the closing price of [the Corporation's] stock on the New York Stock Exchange at the close of business on the date preceding this offer was \$28.125" and described this figure as the "current market price". The individual defendants therefore indicated that tenders of shares could be made at any price between \$28.125 and \$29.50 per share. Said representation was misleading in that the individual defendants

omitted to disclose that they had engaged in acts and transactions, including the purchases of shares and transmission or "leaking" of information about the tender prices, designed to peg, fix, rig, and artificially inflate the price of the stock, in order to achieve temporarily, in the period of time immediately prior to December 17, 1962, a price on the market at the lower end of the scale of prices the individual defendants proposed to use for the purposes of their scheme and plan. During the first quarter of 1962, the price per share of the Corporation's common stock in stock exchange transactions ranged from \$29 $\frac{3}{8}$ to \$33 $\frac{3}{8}$; during the second quarter, the range was \$23 $\frac{1}{2}$ to \$30 $\frac{1}{4}$; during the third quarter, the range was \$23 to \$25 $\frac{1}{2}$; and during October and November, 1962, the range was 42 \$22 to \$25 $\frac{1}{2}$. For the six-month period prior to December 17, 1962, the price of the defendant Corporation's stock exceeded \$28 per share on only two trading dates, one on December 14, 1962, and the other, two days earlier. During the month prior to December 10, 1962, the price of the stock did not even momentarily reach \$27 per share. After consummation of the scheme and plan on January 24, 1963, the price of the stock dropped steadily over several months to a current price of \$15 $\frac{1}{2}$ to \$16 per share.

(e) In making said representations, the individual defendants did not disclose that financial information available to them as officers and directors made it apparent that the earnings of the defendant Corporation were declining and that, at subsequent public announcements of relevant financial information of the Corporation, the market price of the defendant Corporation's shares was most likely to fall by reason of reduced earnings. Operating profits for 1962 were

less than 80% of operating profits for 1961, and in
43 fact were the lowest such profits since 1954. There-
after, profits for the first quarter of 1963 were approxi-
mately 40% below profits for the first quarter of 1962.

(f) The letter of January 7, 1963 (Exhibit "D" attached hereto), which accompanied the Notice of the amendment of the original offer, said Notice being dated January 7, 1963 (Exhibit "C" attached hereto), was deliberately written for the purpose of leading the shareholders of the defendant Corporation into the false belief that the Corporation was prospering, that its prospects were good, and that various financial transactions mentioned therein were constantly improving its position, earnings, etc. Said letter was intended to create a false sense of well-being, thereby to induce shareholders to believe that the officers and directors of the defendant Corporation, including the individual defendants, were acting wisely and in the interests of the Corporation in causing the Corporation to purchase 300,000 shares, and thereby allaying concern over the disposition of shares by the individual defendants. Said letter was further designed falsely to make it appear that the defendant Corporation
44 would in fact be harmed and its interests prejudiced if enough shares, including shares of officers and directors, were not tendered to make it possible to purchase 300,000 shares.

(g) The Notice dated January 7, 1963 (Exhibit "C" attached hereto), which advised the shareholders of certain modifications in the original offer of December 17, 1962 (Exhibit "B" attached hereto), contained the following statement:

"2. Mr. Conrad N. Hilton, Chairman of the Board, President, and the principal shareholder

of the corporation, has advised the corporation that he will tender 85,847 shares of common stock pursuant to the terms of the Offer, which is the number of shares of common stock he may have been required to tender under the terms of the offer."

Said statement was false and misleading, and was known to the individual defendants to be false and misleading, in that it advised the shareholders that defendant Conrad N. Hilton, although entitled to offer more than ten per cent of his stockholdings by virtue of the January 7, 1963 amendment to the offer, would still offer only ten per cent, namely, 85,847 shares. In fact, the total of 85,847 shares was in excess of ten per cent of the holdings of defendant Conrad N. Hilton on January 7, 1963 and on December 17, 1962. Said statement was further false and misleading in that it did not disclose that defendant Conrad N. Hilton had agreed to purchase over 101,000 shares from defendant Henry Crown, from entities controlled by defendant Crown, from members of defendant Crown's family, and from trusts for the benefit of members of defendant Crown's family. Failure to disclose this circumstance helped to conceal the extent to which the plan and scheme and its implementation were intended to inure to the benefit of defendant Henry Crown and his family.

9. As the result of the foregoing false and misleading statements, the defendant Corporation was caused by the individual defendants to purchase a total of 300,000 shares of its common stock for a total price of \$8,564,245.81. Included in said shares were at least 101,650 shares sold to said Corporation, by the use of the United States mails and others means of transportation and communication

46 in interstate commerce, by the officers and directors of the defendant Corporation, including shares sold to the Corporation by the individual defendants as follows:

| | |
|---------------------------|--------|
| Conrad N. Hilton | 85,847 |
| Sam D. Young | 353 |
| Vernon Herndon | 1,147 |
| Herbert C. Blunck | 393 |
| Charles L. Fletcher | 4,100 |
| Robert A. Groves | 6,000 |
| Joseph A. Harper | 2,150 |

Out of the \$8,564,245.81 paid by the Corporation, the individual defendants personally took and received approximately \$2,890,000.00.

10. No demand has been made on the defendant Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

Wherefore, plaintiff prays that judgment be entered against each of the individual defendants who sold
47 stock to the Corporation, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of such sale of said Corporation's common stock in violation of Section 12(2) of the Securities Act of 1933, namely, in the amount of the consideration paid by the Corporation

to each individual defendant for the stock so sold, upon tender of such stock by the Corporation to the vendor, together with interest on such amount of consideration from January 25, 1963, that plaintiff be awarded her costs, and the plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

48

Count V.

Plaintiff complains of defendants Hilton Hotels Corporation, Conrad N. Hilton, Henry Crown, Robert J. Caverly, Robert P. Williford, Spearl Ellison, Y. Frank Freeman, Willard W. Keith, Lawrence Stern, Sam D. Young, Fritz B. Burns and Benno Bechhold, as follows:

1-2. Plaintiff realleges paragraphs 1 and 2 of Count I as paragraphs 1 and 2 of this Count precisely as though said paragraphs were set out in full herein.

3. The defendants Conrad N. Hilton, Benno Bechhold, Fritz B. Burns, Spearl Ellison, Y. Frank Freeman and Willard W. Keith reside in and are citizens of the State of California. The defendants Henry Crown, Robert J. Caverly, Robert P. Williford and Lawrence Stern reside in and are citizens of the State of Illinois. The defendant Sam D. Young resides in and is a citizen of the State of Texas. Each of said defendants is, and at all times relevant to the matters alleged herein was, a director, or both an officer and director, of defendant Hilton Hotels Corporation, as follows:

49 Conrad N. Hilton, Director, Chairman of the Board, and President.

Robert P. Williford, Director, Vice Chairman of the Board.

Robert J. Caverly, Director, Executive Vice President.

Spearl Ellison, Director, Senior Vice President.

Henry Crown, Director, Vice President.
Benno M. Bechhold, Director.
Y. Frank Freeman, Director.
Willard W. Keith, Director.
Lawrence Stern, Director.
Sam D. Young, Director.
Fritz B. Burns, Director.

Defendant Conrad N. Hilton, in addition to being an officer and director, is the largest single holder of shares of common stock in the defendant Corporation, holding approximately twenty-three per cent of the outstanding shares.

50 4. The claim herein pleaded arises under the General Corporation Law of the State of Delaware, Title 8 of the Delaware Code. Jurisdiction of this matter is conferred on this Court by virtue of diversity of citizenship of the parties. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.

5. This action is not a collusive one instituted for the purpose of conferring upon a Court of the United States jurisdiction of a cause of action over which it would not otherwise have jurisdiction.

6-11. Plaintiff realleges paragraphs 6, 7, 8, 9, 10 and 11 of Count I as paragraphs 6 to 11 inclusive of this Count precisely as though said paragraphs were set out in full herein, said allegations being herein included only with respect to the defendants named as defendants in this Count V.

12. Contrary to their fiduciary obligations, the individual defendants engaged in the scheme and plan and
51 deceptive devices and practices set forth above for the purpose of advancing their own personal interests, and particularly the personal financial interests of defendants Conrad N. Hilton and Henry Crown, at the expense of the defendant Corporation and its shareholders. By such illegal and fraudulent means, the individual defend-

ants caused the defendant Corporation to pay out and waste corporate funds in excess of \$8,564,000, of which total the individual defendants named in this Count V personally took and received at least \$2,400,000. To the extent of \$8,564,000 the defendant Corporation has been defrauded, and to the extent of at least \$2,400,000 said defrauding of the defendant Corporation has directly benefited the individual defendants named in this Count V.

13. Plaintiff realleges paragraph 13 of Count I as paragraph 13 of this Count precisely as though said paragraph were set out in full herein.

14. The above-described device, scheme, and plan was carried out by acts and measures taken at the Corporation's principal place of business, 720 South Michigan Avenue, Chicago, Illinois. Thus, the letters and offer of December 17, 1962 and January 7, 1963 (Exhibits "A", 52 "B", "C" and "D") were issued by the Corporation at its Chicago office. Publicity releases in connection with the plan, scheme, and device were similarly issued at Chicago. One of the two designated depositories for shares tendered pursuant to the offer was the American National Bank and Trust Company of Chicago, 33 North LaSalle Street, Chicago, Illinois, and shares were tendered to said depository.

Wherefore, plaintiff prays that the individual defendants be required to account for all losses and damages sustained by the Corporation and for all profits, gains, and benefits derived by such defendants as a result of their illegal acts and breaches of fiduciary duties, together with interest thereon, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

Plaintiff complains of defendants Hilton Hotels Corporation, Conrad N. Hilton, Henry Crown, Robert J. Caverly, Robert P. Williford, Spearl Ellison, Y. Frank Freeman, Willard W. Keith, Lawrence Stern, Sam D. Young, Fritz B. Burns, and Benno Bechhold, as follows:

1.-2. Plaintiff realleges paragraphs 1 and 2 of Count I as paragraphs 1 and 2 of this Count precisely as though said paragraphs were set out in full herein.

3. The defendants Conrad N. Hilton, Benno Bechhold, Fritz B. Burns, Spearl Ellison, Y. Frank Freeman and Willard W. Keith reside in and are citizens of the State of California. The defendants Henry Crown, Robert J. Caverly, Robert P. Williford and Lawrence Stern reside in and are citizens of the State of Illinois. The defendant Sam D. Young resides in and is a citizen of the State of Texas. Each of said defendants is, and at all times relevant to the matters alleged herein was, a director, or both an officer and director, of defendant Hilton Hotels Corporation, as follows:

Conrad N. Hilton, Director, Chairman of the Board, and President.

Robert J. Caverly, Director, Executive Vice President.

Spearl Ellison, Director, Senior Vice President.

Henry Crown, Director, Vice President.

Benno M. Bechhold, Director.

Y. Frank Freeman, Director.

Willard W. Keith, Director.

Lawrence Stern, Director.

Sam D. Young, Director.

Fritz B. Burns, Director.

Defendant Conrad N. Hilton, in addition to being an officer and director, is the largest single holder of shares of common stock in the defendant Corporation, holding approximately twenty-three percent of the outstanding shares.

55 4. The claim herein pleaded arises under the General Corporation Law of the State of Delaware, Title 8 of the Delaware Code. Jurisdiction of this matter is conferred on this Court by virtue of diversity of citizenship of the parties. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.

5. This action is not a collusive one instituted for the purpose of conferring upon a Court of the United States jurisdiction of a cause of action over which it would not otherwise have jurisdiction.

6-11. Plaintiff realleges paragraphs 6, 7, 8, 10, and 11 of Count I as paragraphs 6 to 11 inclusive of this Count precisely as though said paragraphs were set out in full herein, said allegations being herein included only with respect to the defendants named as defendants in this Count VI.

12. Contrary to their fiduciary obligations, the individual defendants engaged in the scheme and plan and deceptive devices and practices set forth above for the purpose of advancing their own personal interests, and particularly the personal financial interests of defendants Conrad N. Hilton and Henry Crown, at the expense of the defendant Corporation and its shareholders. By such illegal and fraudulent means, the individual defendants caused the defendant Corporation to pay out and waste corporate funds in excess of \$8,564,000, of which total the individual defendants named in this Count VI personally took and received at least \$2,400,000. To the extent of \$8,564,000 the defendant Corporation has been defrauded, and to the extent of at least \$2,400,000 said defrauding of the defendant Corporation has directly benefited the individual defendants named in this Count VI.

13. Plaintiff realleges paragraph 13 of Count I as paragraph 13 of this Count precisely as though said paragraph were set out in full herein.

14. The foregoing plan, scheme, and device, which involved the retirement of a substantial amount of common stock purchased by the Corporation from its stockholders, constituted a reduction of capital of the Corporation under Section 244 of the General Corporation Law of the State of Delaware. Section 244(b) of the General Corporation Law of the State of Delaware defines as a reduction of capital, among other transactions, "the purchase of shares for retirement, either pro rata from all holders of shares of that class of stock or by purchasing such shares from time to time in the open market or at private sale". The individual defendants acted wrongfully and illegally in ignoring and violating the requirements of Section 244 in the following respects:

(a) The plan, scheme, and device to cause the Corporation to purchase its shares pursuant to the Letters and Offer set forth in Exhibits "A", "B", "C" and "D" attached hereto was not approved by written consent of the shareholders of the Corporation or by the vote of a majority of the shares at a meeting of stockholders called for that purpose;

(b) The certificate required to be filed with the Secretary of State of the State of Delaware and thereafter to be recorded was not filed or recorded;

(c) The price or prices at which the purchase of shares was to be effected was neither fixed nor approved by stockholders;

58 (d) The requirement for publication of notice of the reduction of capital was not met in any respect.

15. By failing to comply with the requirements of Section 244 of the General Corporation Law of the State of Delaware that the above-described plan, scheme, and device be submitted to a vote of shareholders at a meeting upon at least ten days notice and that the price or prices

for purchase of stock be approved by the shareholders, the individual defendants were also able to avoid compliance with the Proxy Rules (Regulation 14) under the Securities Exchange Act of 1934; these rules compel the disclosure of all material facts in connection with a transaction proposed for shareholders' approval.

16. By failing to comply with said requirements of Section 244 of the General Corporation Law of the State of Delaware, the individual defendants caused the defendant Corporation to adopt and carry out said plan, scheme, and device by action solely of the Corporation's board of directors, which action was taken upon the advice and votes of directors who were advancing their personal financial interests at the expense of the defendant Corporation and its stockholders.

59 17. The above-described device, scheme, and plan was carried out by acts and measures taken at the Corporation's principal place of business, 720 South Michigan Avenue, Chicago, Illinois. Thus, the letters and offer of December 17, 1962 and January 7, 1963 (Exhibit "A", "B", "C" and "D") were issued by the Corporation at its Chicago office. Publicity releases in connection with the plan, scheme, and device were similarly issued at Chicago. One of the two designated depositaries for shares tendered pursuant to the offer was the American National Bank and Trust Company of Chicago, 33 North LaSalle Street, Chicago, Illinois, and shares were tendered to said depositary.

Wherefore, plaintiff prays that this Court grant equitable relief to set aside the wrongful and illegal acts and transactions carried out and caused to be carried out by the individual defendants and to compel said defendants to make restitution for all losses and damages sustained by the Corporation as a result of these illegal and wrongful acts,

together with interest thereon; that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

60

Count VII.

Plaintiff complains of the defendants, and each of them, as follows:

1.-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 of this Count, precisely as though said paragraphs had been set out in full herein.

4. Defendant Hilton Credit Corporation is a Delaware Corporation which maintains its principal place of business and its executive offices in the State of California; said defendant transacts business in the Northern District of Illinois. Defendant Hilton Credit Corporation engages in the business of servicing, processing and purchasing charge accounts, and buys, as a principal part of its business, the accounts receivable of the defendant Hilton Hotels Corporation.

5. At all times relevant to the matters alleged herein, a majority of the members of the board of directors of defendant Hilton Credit Corporation has been made up of officers and directors of defendant Hilton Hotels Corporation. These persons, through their domination and control over the affairs of Hilton Hotels Corporation, similarly have dominated and controlled the affairs of defendant Hilton Credit Corporation; their official positions were and are as follows:

| Name | Position held with Hilton Hotels Corp. | Position held with Hilton Credit Corp. |
|---------------------|--|--|
| Conrad N. Hilton | Director, Chairman of the Board, President | Director |
| Benno M. Bechhold | Director | Director, President |
| Charles L. Fletcher | Vice President, Treasurer | Director, Executive Vice President |
| Robert P. Williford | Director, Vice Chairman of the Board of Directors | Director |
| Henry Crown | Director, Vice President | Director |
| Horace C. Flanigan | Director | Director |
| Barron Hilton | Vice President | Director |

Before February of 1963, defendant Hilton Hotels Corporation owned 34% of the outstanding stock of defendant Hilton Credit Corporation, and the individual defendants collectively owned more than 20% of the outstanding stock of Hilton Credit Corporation.

6. The claim herein pleaded arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and the Rules of the Securities and Exchange Commission adopted thereunder. Section 10(b) of the Securities Exchange Act of 1934 reads as follows:

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Rules adopted by the Securities Exchange Commission under Section 10 of the Act of 1934 reads as follows:

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

63 (1) to employ any device, scheme, or artifice to defraud;

(2) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

7. Jurisdiction of this matter is conferred on this Court by Section 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U. S. C. § 1337.

8. In January of 1963, the individual defendants, as the officers and directors having control over the affairs of both the defendant Hilton Hotels Corporation and the defendant Hilton Credit Corporation, with the approval, cooperation and assistance of the Hilton Credit Corporation, caused a document entitled "Letter of Transmittal", and a document entitled "Offer", to be transmitted by de-

defendant Hilton Hotels Corporation through the United States mails to the shareholders of defendant Hilton Credit

64 Corporation, wherein the defendant Hilton Hotels Corporation, for a limited period of time and under certain specified conditions, offered to purchase 1,390,706 shares of the Credit Corporation's outstanding \$1.00 par value common stock for a price of \$3.25 per share. True and correct copies of the documents mentioned above, namely the Letter of Transmittal dated January 15, 1963, and the Offer dated January 15, 1963, are attached hereto and made a part hereof by reference thereto as Exhibits "E" and "F", respectively.

9. In making the offer above described, the individual defendants caused the defendant Hotels Corporation to state in writing, in the Letter of Transmittal of January 15, 1963 (Exhibit "E" attached hereto), which document was transmitted through the United States mails to shareholders of the defendant Credit Corporation, the reasons why the offer was being made, as follows:

As you know, Hilton Credit is obligated on notes to various banks in the aggregate amount of \$12,150,000, which mature under their respective terms on February 28, 1963. Under the terms of an Extension Agreement, dated February 9, 1962 with said banks, Hilton Credit has the option to extend the maturities of said notes to February 28, 1964, provided, among other things, that the \$5,000,000 Subordinated Notes, due March 1, 1963, have been extended to a date not earlier than March 1, 1964. Hilton Hotels holds \$1,900,000 of said Subordinated Notes and has agreed to extend the maturity of the same until March 1, 1964, if all of the other holders of said Subordinated Notes similarly agree. Although all of the other
65 holders of such Subordinated Notes have not agreed to extend their maturity as yet, it is anticipated that said holders will so agree to extend the maturity of the Subordinated Notes until March 1, 1964. Accord-

ingly, it is anticipated that the maturities of the bank loans will be extended to February 28, 1964. There is no provision for the extension of the bank loans or the Subordinated Notes after February 28, 1964 and March 1, 1964, respectively. As a result, Hilton feels that it may be required to take a major role in any refinancing of such indebtedness.

Under the circumstances, the Board of Directors of Hilton has authorized the making of an offer to Hilton Credit Stockholders to purchase 80% of the outstanding shares of Common Stock of Hilton Credit, including the shares already owned by Hilton, for \$3.25 per share upon the terms and conditions set forth in the enclosed formal offer. Hilton has no intention of merging with Hilton Credit.

No other statement of reasons appears in any of the above-designated documents.

10. Said explanation of the purpose of defendant Hilton Hotels Corporation in making the aforesaid offer was false and misleading, and was known by the individual defendants to be false and misleading, in the respects indicated hereinafter. Said false and misleading statement, the Offer to purchase 1,390,706 shares of common stock described above, and the Letter of Transmittal specified above which were sent out by the individual defendants and the defendant Hilton Hotels Corporation to the 66 shareholders of defendant Hilton Credit Corporation were integral parts of a manipulative and deceptive device or contrivance and of a scheme to defraud, and constituted acts and practices carried out in the course of the execution of such device and scheme, all in violation of the provisions of Section 10(b) of the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission promulgated thereunder, in that—

(a) The individual defendants were engaged in a plan and scheme to make it possible for defendant Con-

rad N. Hilton and other officers and directors of the two corporations to dispose of shares in the defendant Hilton Credit Corporation at a price more favorable than they could obtain in the market. Furthermore, the individual defendants were engaged in a plan and scheme to make it possible for defendants Henry Crown and Barron Hilton, the son of defendant Conrad N. Hilton, to dispose of large holdings in the common stock of the defendant Hilton Credit Corporation held by them at a price above the market price for such stock;

- 67 (b) The individual defendants acted in such a way as to conceal from defendant Hilton Hotels Corporation and from its stockholders the true purpose of the offer to purchase described above, and in such a way as to make it appear that it was to said Hotels Corporation's advantage to effect such a purchase of Hilton Credit Corporation shares. In fact, such a purchase was contrary to the interests of the defendant Hilton Hotels Corporation since the effect of it was to reduce working capital by approximately \$3,441,000 at a time when said Corporation's debt and the need for working capital was increasing, to cause Hilton Hotels Corporation to pay an excessive price for the stock of Hilton Credit Corporation, and to cause Hilton Hotels Corporation to take a larger role in underwriting Hilton Credit Corporation's debts, liabilities, and losses. At the end of 1962, Hilton Credit Corporation had losses totalling more than \$8,500,000 and a capital deficit of more than \$1,400,000. Said Credit Corporation owed \$12,000,000 to banks and other financial institutions. It also was indebted to defendants
- 68 Conrad N. Hilton, Henry Crown, Barron Hilton, Hilton Hotels Corporation, and others in the amount of \$5,000,000 on notes payable in 1963.

(c) The individual defendants represented that on January 10, 1963 the market price of Hilton Credit Corporation stock was between \$3.125 and \$3.50 per share. Said representation was misleading in that the individual defendants did not disclose that they had engaged in acts and transactions, including the transmission or "leaking" of information about the proposed tender price, and the purchase of or bidding on shares, designed to peg, fix, rig, and artificially inflate that price in order to achieve temporarily, in the period of time immediately prior to January 15, 1963, market price quotations close to the price the individual defendants proposed to use for the purposes of their scheme and plan. During the two years prior to 1961, the stock of Hilton Credit Corporation was traded over-the-counter at a range of prices of \$4½ to \$15 per share. During 1961, the range was \$2½ to \$5½; during 1962, the range was \$1½ to \$3½. During December 1962, the month immediately preceding the offer and tenders, the range of prices was \$2½ Bid—
69 \$3½ Asked. Among other devices for causing a temporary artificial price rise in the stock of Hilton Credit Corporation at the end of January 1963, the individual defendants announced to stockholders of Hilton Hotels Corporation, by letter of January 7, 1963 (Exhibit "D" attached hereto), that on January 3, 1963, the board of directors of Hilton Hotels Corporation had authorized a tender plan to purchase shares of Hilton Credit Corporation at a price of \$3.25 per share. This announcement immediately caused the price of the stock to rise sharply.

(d) The proposal set forth in the Letter of January 15, 1963 (Exhibit "E" attached hereto) from Hilton Hotels Corporation to stockholders of Hilton Credit Corporation stated that Hilton Hotels Corpora-

tion had been authorized to purchase 80% of the outstanding shares of Hilton Credit Corporation, including shares already owned by Hilton Hotels Corporation. A similar objective was set forth in the Offer of January 15, 1963 (Exhibit "F" attached hereto); Hilton Hotels Corporation was not obligated to purchase any shares if 80% could not be obtained. Notwithstanding these representations and conditions, Hilton Hotels Corporation in fact was caused by the individual defendants to purchase a lesser amount of shares, which, together with previously-owned shares, resulted in the ownership of only 67% of the outstanding shares of Hilton Credit Corporation. The defendant Hilton Hotels Corporation was thereby caused to expend great amounts of money in the interests solely of the individual defendants, without securing the significant federal income tax advantages which 80% ownership would have provided.

(e) The interests of the individual defendants Conrad N. Hilton, Henry Crown, and others as creditors of Hilton Credit Corporation were concealed in the Letter and Offer of January 15, 1963 (Exhibits "B" and "F" attached hereto) and in the Letter of January 7, 1963 (Exhibit "D" attached hereto). When the stockholders of both companies were informed that Hilton Hotels Corporation was to be put into a position of greater responsibility for the financial affairs and liabilities of Hilton Credit Corporation, it was not disclosed that this increased responsibility and financial backing would inure in good part to the personal advantage of those individual defendants who, as creditors, faced serious collection problems.

(f) The individual defendants could not have otherwise sold the stock of Hilton Credit Corporation which they sold to Hilton Hotels Corporation pursuant to

the offer except by a secondary public offering, with all of the high costs attendant thereupon, with full disclosure of material facts by way of registration in conformity to the federal security laws and rules and regulations, at a price far below the price specified in the offer, and at a time when the market for public offerings was unfavorable. It was the purpose and intent of the individual defendants, by their illegal plan, scheme, and contrivance, to avoid any such disadvantageous consequences to their own personal interests.

11. As the result of said manipulative and deceptive device and scheme, and its carrying out pursuant to the false and misleading representations and deceptive actions specified above, the defendant Hilton Hotels Corporation was caused by the individual defendants to purchase a
72 total of 1,058,997 shares of Hilton Credit Corporation common stock at a total price of \$3,441,740.25. Included in said shares were 631,262 shares sold to said Corporation through the use of the United States mails and other means of transportation and communication in interstate commerce, by the officers and directors of the defendant Hilton Hotels Corporation, including shares sold to said Corporation by the individual defendants as follows:

| | |
|--|---------|
| Conrad N. Hilton (including a corporation controlled by him)..... | 375,967 |
| Barron Hilton | 126,392 |
| Henry Crown (including a corporation controlled by him) | 70,631 |
| Charles L. Fletcher | 24,100 |
| Robert P. Williford | 14,150 |
| Vernon Herndon | 4,408 |
| Robert J. Caverly | 464 |
| Conrad N. Hilton Foundation (a charitable foundation controlled by Conrad N. Hilton) | 28,334 |

12. At all times relevant to the matters alleged herein, the individual defendants, and each of them, as officers and directors of the defendant Hilton Hotels Corporation, owed a fiduciary duty to said Corporation and to its 73 shareholders, and said fiduciary obligation required that the officers and directors protect, preserve, and advance the welfare of the defendant Corporation and its shareholders, act in the best interests of the Corporation and its shareholders, and refrain from acts and doings whereby the personal benefit of the directors and officers, or any one or more of them, or the interests of Hilton Credit Corporation, would be enhanced to the detriment of the defendant Hotels Corporation and its shareholders.

13. Contrary to their fiduciary duty and obligation, the individual defendants engaged in the scheme and plan and deceptive devices and practices set forth above, for the purpose of advancing their own personal interests, and particularly the personal financial interests of defendants Conrad N. Hilton, Barron Hilton, and Henry Crown, and also the interests of Hilton Credit Corporation, at the expense of the defendant Corporation and its shareholders. By such illegal and fraudulent means, the individual defendants caused the defendant Hotels Corporation to pay out and waste corporate funds in excess of \$3,441,000, of which total the individual defendants personally took and received approximately \$2,002,369.50. To the extent of \$3,441,000 the defendant Hotels Corporation has been defrauded, 74 and to the extent of \$2,002,369.50 said defrauding of the defendant Hotels Corporation has directly benefited the individual defendants.

14. No demand has been made on the defendant Hilton Hotels Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the

affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Hotels Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

15. The above-described device, scheme, and plan was carried out and put into effect by the individual defendants and the defendant Corporation by and through the use of the United States mails and other means of communication and transmission of information in interstate commerce, including the telephone.

Wherefore, plaintiff prays that judgment be entered against the individual defendants, and the defendant
75 Hilton Credit Corporation, jointly and severally, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of their illegal acts in violation of Section 10(b) of the Securities and Exchange Act of 1934 and the Rules and Regulations promulgated thereunder, namely in the amount of \$3,441,000, together with interest thereon from February 5, 1963, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

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Count VIII.

Plaintiff complains of the defendants, and each of them, as follows:

1-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

4-5. Plaintiff realleges paragraphs 4 and 5 inclusive of Count VII as paragraphs 4 and 5 of this Count, precisely as though said paragraphs were set out in full herein.

6. The claim herein pleaded arises under Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 17q(a) which reads as follows:

Sec. 17 (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

7. Jurisdiction of this matter is conferred on this Court by Section 22 of the Securities Act of 1933, 15 U.S.C. Section 77z; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U.S.C. Section 1337.

8-15. Plaintiff realleges paragraphs 8 to 15 inclusive of Count VII as paragraphs 8 to 15 inclusive of this Count,

precisely as though said paragraphs were set out in full herein.

Wherefore, plaintiff prays that judgment be entered against the individual defendants and the defendant Hilton Credit Corporation, jointly and severally, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of their illegal acts in violation of Section 17(a) of the Securities Act of 1933, namely in the amount of \$3,441,000, together with interest from February 5, 1963, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

78

Count IX.

Plaintiff complains of the defendants, and each of them, as follows:

1.-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

4.-5. Plaintiff realleges paragraphs 4 and 5 inclusive of Count VII as paragraphs 4 and 5 of this Count, precisely as though said paragraphs were set out in full herein.

6. The claim herein pleaded arises under Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 77i(4) and 77e which read as follows:

Sec. 9. (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

* * * * *

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

* * * * *

79 (e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

7.-9. Plaintiff realleges paragraphs 7 to 9 inclusive of Count VII as paragraphs 7 to 9 inclusive of this Count, precisely as though said paragraphs were set out in full herein.

10. Said explanation was false and misleading, and was known by the individual defendants to be false and misleading, in respects indicated hereinafter. Said false and misleading statement, as well as other false and misleading statements contained in the documents (Exhibits "A", "B", "C", "D", "E", and "F") which are hereinafter specifically set forth, were integral parts of a plan and scheme designed to cause defendant Hotels Corporation to purchase shares of stock and to deceive the shareholders, other than the individual defendants, into falsely believing that the purchase of 1,390,706 shares of Hilton Credit Corporation stock by Hilton Hotels Corporation would inure to the benefit of Hilton Hotels Corporation, all in violation of Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934, in that:

- (a) The individual defendants represented, that on January 10, 1963 the market price of Hilton Credit Corporation stock was between \$3.125 and \$3.50 per share. Said representation was misleading in that the individual defendants did not disclose that they had engaged in acts and transactions, including the transmission or "leaking" of information about the proposed tender price, and the purchase of or bidding on shares, designed to peg, fix, rig, and artificially inflate that price in order to achieve temporarily, in the period of time immediately prior to January 15, 1963, market price quotations close to the price the individual defendants proposed to use for the purposes of their scheme and plan. During the two years prior to 1961, the stock of Hilton Credit Corporation was traded over-the-counter at a range of prices of \$4½ to \$15 per share. During 1961, the range was \$2½ to \$5½; during 1962, the range was \$1½ to \$3¾. During 81 December 1962 the month immediately preceding the offer and tenders, the range of prices was \$2½ Bid-

\$3 $\frac{1}{8}$ Asked. Among other devices for causing a temporary artificial price rise in the stock of Hilton Credit Corporation at the end of January 1963, the individual defendants announced to stockholders of Hilton Hotels Corporation, by letter of January 7, 1963 (Exhibit "D" attached hereto), that on January 3, 1963, the board of directors of Hilton Hotels Corporation had authorized a tender plan to purchase shares of Hilton Credit Corporation at a price of \$3.25 per share. This announcement immediately caused the price of the stock to rise sharply.

(b) The interests of the individual defendants Conrad N. Hilton, Henry Crown, and others as creditors of Hilton Credit Corporation were concealed in the Letter and Offer of January 15, 1963 (Exhibits "E" and "F" attached hereto) and in the Letter of January 7, 1963 (Exhibit "D" attached hereto). When the stockholders of both companies were informed that Hilton Hotels Corporation was to be put into a position of greater responsibility for the financial affairs and liabilities of Hilton Credit Corporation, it was
82 not disclosed that this increased responsibility and financial backing would inure in good part to the personal advantage of those individual defendants who, as creditors, faced serious collection problems.

11. As the result of the foregoing false and misleading representations, the defendant Hilton Hotels Corporation was caused by the individual defendants to purchase a total of 1,058,997 shares of Hilton Credit Corporation common stock at a total price of \$3,441,740.25. Included in said shares were 631,262 shares purchased, by the use of the United States mails and other means of transportation and communication in interstate commerce, from the officers and directors of defendant Hilton Hotels Corpora-

tion, including shares from the individual defendants as follows:

| | |
|--|---------|
| Conrad N. Hilton (including a corporation controlled by him)..... | 375,967 |
| Barron Hilton | 126,392 |
| Henry Crown (including a corporation controlled by him)..... | 70,631 |
| Charles L. Fletcher..... | 24,100 |
| Robert P. Williford..... | 14,150 |
| Vernon Herndon | 4,408 |
| 83 Robert J. Caverly..... | 464 |
| Conrad N. Hilton Foundation (a charitable foundation controlled by Conrad N. Hilton) | 28,334 |

12. No demand has been made on the defendant Hilton Hotels Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

13. The above-described device, scheme, and plan was carried out and put into effect by the individual defendants by and through the use of the United States mails and other means of communication and transmission
84 of information in interstate commerce, including the telephone.

Wherefore, plaintiff prays that judgment be entered against the individual defendants, and the defendant

Hilton Credit Corporation, jointly and severally, for the damages sustained by the defendant Hilton Hotels Corporation by virtue of their illegal acts in violation of Sections 9(a)(4) and 9(e) of the Securities Act of 1933, namely in the amount of \$3,441,740.25, together with interest thereon from February 5, 1963, that plaintiff be awarded her costs, and the plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

85

Count X.

Plaintiff complains of the defendants Conrad N. Hilton, Barron Hilton, Henry Crown, Charles L. Fletcher, Robert P. Williford, Vernon Herndon, Robert J. Caverly, and of the defendant Hilton Hotels Corporation, as follows:

1-3. Plaintiff realleges paragraphs 1 to 3 inclusive of Count I as paragraphs 1 to 3 inclusive of this Count precisely as though said paragraphs were set out in full herein.

4-5. Plaintiff realleges paragraphs 4 and 5 inclusive of Count VII as paragraphs 4 and 5 inclusive of this Count precisely as though said paragraphs were set out in full herein.

6. The claim herein pleaded arises under Section 12(2) of the Securities Act of 1933, 15 U. S. C. Section 771(2), which reads as follows:

Sec. 12. Any person who—

* * *

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (2) thereof), by the use of any means or instruments of transportation of communication in interstate commerce or of the mails,

by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration
86 paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

7. Jurisdiction of this matter is conferred on this Court by Section 22 of the Securities Act of 1933, 15 U. S. C. Section 77z; jurisdiction also rests on Section 1337 of the Judicial Code, 28 U. S. C. Section 1337.

8.-9. Plaintiff realleges paragraphs 8 and 9 of Count VII as paragraphs 8 and 9 of this Count precisely as though said paragraphs were set out in full herein.

10. The various communications made to the defendant Corporation's shareholders of Hilton Credit Corporation and referred to herein as Exhibits "E" and "F", contain both untrue statements and statements which were misleading because of their failure to state certain material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading. Said untruths and omissions, which were known to the individual defendants but not to the other shareholders of defendant Hilton Hotels Corporation, were caused to be communicated by the individual defendants
to the shareholders of Hilton Credit Corporation in
87 order to enable certain of said individual defendants to dispose of large amounts of the common stock of

defendant Hilton Credit Corporation at prices above the market price by selling said stock to the defendant Hilton Hotels Corporation. Said sales were in violation of the provisions of Section 12(2) of the Securities Act of 1933 in that:

(a) The individual defendants were engaged in a plan and scheme to make it possible for defendant Conrad N. Hilton and other officers and directors of the two corporations to dispose of shares in the defendant Hilton Credit Corporation at prices more favorable than they could obtain in the market. Furthermore, the individual defendants were engaged in a plan and scheme to make it possible for defendants Henry Crown and Barron Hilton to dispose of large holdings in the common stock of the defendant Hilton Credit Corporation held by them, at prices above the market prices for such stock;

88 (b) The individual defendants acted in such a way as to conceal from defendant Hilton Hotels Corporation and from its stockholders the true purpose of the offer to purchase described above, and in such a way as to make it appear that it was to said Hotels Corporation's advantage to effect such a purchase of Hilton Credit Corporation shares. In fact, such a purchase was contrary to the interests of defendant Hilton Hotels Corporation since the effect of it was to reduce working capital by approximately \$3,441,000 at a time when the Corporation's debt and the need for working capital was increasing, to cause Hilton Hotels Corporation to pay an excessive price for the stock of Hilton Credit Corporation, and to cause Hilton Hotels Corporation to take a larger role in underwriting Hilton Credit Corporation's debts, liabilities and losses. At the end of 1962, Hilton Credit Corporation had losses totaling more than \$8,500,000 and a capital deficit of

more than \$1,400,000. Said Credit Corporation owed \$12,000,000 to banks and other financial institutions. It also was indebted to defendants Conrad N. Hilton, Henry Crown, Barron Hilton, Hilton Hotels Corporation, and others in the amount of \$5,000,000 on notes payable in 1963.

- 89 (c) The individual defendants represented that on January 10, 1963 the market price of Hilton Credit Corporation stock was between \$3.125 and \$3.50 per share. Said representation was misleading in that the individual defendants did not disclose that they had engaged in acts and transactions, including the transmission or "leaking" of information about the proposed tender price, and the purchase of or bidding on shares, designed to peg, fix, rig, and artificially inflate that price in order to achieve temporarily, in the period of time immediately prior to January 15, 1963, market price quotations close to the price the individual defendants proposed to use for the purposes of their scheme and plan. During the two years prior to 1961, the stock of Hilton Credit Corporation was traded over-the-counter at a range of prices of \$4 $\frac{1}{4}$ to \$15 per share. During 1961, the range was \$2 $\frac{1}{2}$ to \$5 $\frac{1}{4}$; during 1962, the range was \$1 $\frac{1}{8}$ to \$3 $\frac{3}{8}$. During December 1962, the month immediately preceding the offer and tenders, the range of prices was \$2 $\frac{5}{8}$ Bid—\$3 $\frac{1}{8}$ Asked. Among other devices for causing a temporary artificial price rise in the stock of Hilton Credit Corporation at
- 90 the end of January 1963, the individual defendants announced to stockholders of Hilton Hotels Corporation, by letter of January 7, 1963 (Exhibit "D" attached hereto), that on January 3, 1963, the board of directors of Hilton Hotels Corporation had authorized a tender plan to purchase shares of Hilton Credit Corporation at a price of \$3.25 per share. This announce-

ment immediately caused the price of the stock to rise sharply.

(d) The interests of the individual defendants Conrad N. Hilton, Henry Crown, and others as creditors of Hilton Credit Corporation were concealed in the Letter and Offer of January 15, 1963 (Exhibits "E" and "F" attached hereto) and in the Letter of January 7, 1963 (Exhibit "D" attached hereto). When the stockholders of both companies were informed that Hilton Hotels Corporation was to be put into a position of greater responsibility for the financial affairs and liabilities of Hilton Credit Corporation, it was not disclosed that this increased responsibility and financial backing would inure in good part to the personal advantage of those individual defendants who, as creditors, faced serious collection problems.

91 (e) The individual defendants could not have otherwise sold the stock of Hilton Credit Corporation which they sold to Hilton Hotels Corporation pursuant to the offer except by a secondary public offering, with all of the high costs attendant thereupon, with full disclosure of material facts by way of registration in conformity to the federal security laws and rules and regulations, at a price far below the price specified in the offer, and at a time when the market for public offerings was unfavorable. It was the purpose and intent of the individual defendants, by their illegal plan, scheme, and contrivance, to avoid any such disadvantageous consequences to their own personal interests.

11. As the result of the foregoing false and misleading statements, the defendant Hilton Hotels Corporation was caused by the individual defendants to purchase a total of 1,058,997 shares of Hilton Credit Corporation common

stock for a total price of \$3,441,740.25. Included in said shares were 631,262 shares sold to said Hotels Corporation, by the use of the United States mails and other means of transportation and communication in interstate commerce, by the officers and directors of the defendant

92 Hotels Corporation, including shares sold to the Corporation by the individual defendants as follows:

| | |
|--|---------|
| Conrad N. Hilton (including a corporation controlled by him) | 375,967 |
| Barron Hilton | 126,392 |
| Henry Crown (including a corporation controlled by him) | 70,631 |
| Charles L. Fletcher | 24,100 |
| Robert P. Williford | 14,150 |
| Vernon Herndon | 4,408 |
| Robert J. Caverly | 464 |
| Conrad N. Hilton Foundation (a charitable foundation controlled by Conrad N. Hilton) | 28,334 |

12. No demand has been made on the defendant Hilton Hotels Corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances, pleaded above, whereby the affairs of the defendant Corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved, and implemented the above-described illegal and fraudulent scheme, plan and deceptive acts and practices employed to defraud the defendant Hotels Corporation and its shareholders. Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above.

Wherefore, plaintiff prays that judgment be entered against each of the individual defendants who sold Hilton Credit Corporation stock to Hilton Hotels Corporation for

the damages sustained by the defendant Hilton Hotels Corporation by virtue of such sale of said Credit Corporation's common stock in violation of Section 12(2) of the Securities Act of 1933, namely, in the amount of the consideration paid by the Hotels Corporation to each individual defendant for the stock so sold, together with interest on such amount of consideration from February 5, 1963, that plaintiff be awarded her costs, and the plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

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Count XI.

Plaintiff complains of defendants Hilton Hotels Corporation, Conrad N. Hilton, Henry Crown, Robert J. Caverly, Robert P. Williford, Spearl Ellison, Y. Frank Freeman, Willard W. Keith, Lawrence Stern, Sam D. Young, Fritz B. Burns and Benno Bechhold, as follows:

1.-2. Plaintiff realleges paragraphs 1 and 2 of Count I as paragraphs 1 and 2 of this Count precisely as though said paragraphs were set out in full herein.

3. The defendants Conrad N. Hilton, Benno Bechhold, Fritz B. Burns, Spearl Ellison, Y. Frank Freeman and Willard W. Keith reside in and are citizens of the State of California. The defendants Henry Crown, Robert J. Caverly, Robert P. Williford and Lawrence Stern reside in and are citizens of the State of Illinois. The defendant Sam D. Young resides in and is a citizen of the State of Texas. Each of said defendants is, and at all times relevant to the matters alleged herein was, a director, or both an officer
95 and director, of defendant Hilton Hotels Corporation, as follows:

Conrad N. Hilton, Director, Chairman of the Board, and President

Robert P. Williford, Director, Vice Chairman of the Board

Robert J. Caverly, Director, Executive Vice President

Spearl Ellison, Director, Senior Vice President

Henry Crown, Director, Vice President

Benno M. Bechhold, Director

Y. Frank Freeman, Director

Willard W. Keith, Director

Lawrence Stern, Director

Sam D. Young, Director

Fritz B. Burns, Director

4.-5. Plaintiff realleges paragraphs 4 and 5 inclusive of Count VII as paragraphs 4 and 5 of this Count, precisely as though said paragraphs had been set out in full herein, said allegations being herein included only with respect to the defendants named as defendants in this Count XI.

6. The claim herein pleaded arises under the General Corporation Law of the State of Delaware, Title 8 of 96 the Delaware Code. Jurisdiction of this matter is conferred on this Court by virtue of diversity of citizenship of the parties. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.

7. This action is not a collusive one instituted for the purpose of conferring upon a Court of the United States jurisdiction of a cause of action over which it would not otherwise have jurisdiction.

8.-14. Plaintiff realleges paragraphs 8, 9, 10, 11, 12, 13 and 14 of Count VII as paragraphs 8 to 14 inclusive of this Count precisely as though said paragraphs were set out in full herein, said allegations being herein included only with respect to the defendants named as defendants in this Count XI.

15. The above-described device, scheme, and plan was carried out by acts and measures taken at the principal place of business of Hilton Hotels Corporation, 720 South Michigan Avenue, Chicago, Illinois. Thus, the letter and

offer of January 15, 1963 (Exhibits "E" and "F") were issued by the Hotels Corporation at its Chicago office. Publicity releases in connection with the plan, scheme, and device were similarly issued at Chicago. One of the two designated depositaries for shares tendered pursuant to the offer was the American National Bank and Trust Company of Chicago, 33 North LaSalle Street, Chicago, Illinois, and shares were tendered to said depositary.

97 Wherefore, plaintiff prays that the individual defendants be required to account for all losses and damages sustained by the Corporation and for all profits, gains, and benefits derived by such defendants as a result of their illegal acts and breaches of fiduciary duties, together with interest thereon, that plaintiff be awarded her costs, and that plaintiff's attorneys be awarded fees for services rendered to her and all other common shareholders of defendant Hilton Hotels Corporation and to the defendant Corporation for the instituting and prosecuting of this corporate cause of action.

Richard F. Watt,
Walter J. Rockler,
David R. Kentoff,

Attorneys for Plaintiff.

Cotton, Watt, Rockler & Jones,
105 West Adams Street,
Chicago 3, Illinois,
FRanklin 2-6275.

State of New York, }
County of New York. } ss.

Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing Complaint by her attorneys subscribed and is familiar with the matters therein alleged; that as to the matters alleged in paragraph 1 of each Count; in paragraphs 6 and 7 of Counts I, II, III, IV, and V; in the last sentence of paragraph 13 of Counts I, II, V and VI; in the last sentence of paragraph 10 of Counts III and IV; in paragraph 5 of Count VI; in the last sentence of paragraph 14 of Counts VII, VIII, and XI; in the last sentence of paragraph 12 of Counts IX and X—said allegations are true and correct. That as to all other matters alleged in the above and foregoing Complaint, she makes said allegations on information and belief and believes them to be true.

Dora Surowitz.

Subscribed and Sworn to before me this 12 day of December, 1963.

Charles Horn,
Notary Public.

Exhibit "A".

Hilton Hotels.

Letter of Transmittal.

December 17, 1962.

To the Holders of Common Stock of
Hilton Hotels Corporation:

There is enclosed an offer of tender by Hilton Hotels Corporation (hereinafter referred to as "Hilton") which permits you, if you so desire, to tender all or any part of your stock for sale to this corporation. The reason for so doing is set forth in the enclosed offer letter. A copy of the last quarterly report of the corporation has been sent to you.

As indicated in the offer, you may select the price between \$28.125 and \$29.50 per share at which you are willing to tender all or any part of your stock. If your tendering price is low enough to be accepted and if 300,000 shares are tendered, Hilton shall purchase your stock for cash. For example, if the stockholders of this corporation tender 500,000 shares, 100,000 each at \$28.125, \$28.25, \$28.50, \$29.00 and \$29.50 per share, Hilton shall purchase the shares tendered at \$28.125, \$28.25 and \$28.50, but not the shares tendered at \$29.00 or \$29.50 per share.

As stated in the offer, if less than 300,000 shares are tendered, Hilton shall not be obligated to, but may, purchase all shares tendered at the tendering price. Reference is made to the offer with respect to the provisions pertaining to the tender of shares by the officers and directors of Hilton.

So that you may be fully advised on all recent develop-

ments, I am delighted to inform you that the land under The Palmer House has been sold to Prudential Insurance Company of America (hereinafter referred to as "Prudential") for the sum of \$14,000,000 and leased back to a wholly owned subsidiary of Hilton Hotels Corporation at a rental of \$962,500 per annum, for a period of thirty years, with renewal rights aggregating sixty years. The subsidiary has negotiated a mortgage in the amount of \$15,000,000 with Prudential at 6% interest. An initial disbursement of \$10,500,000 has been made under this mortgage, the proceeds of which were used to retire the existing first mortgage on The Palmer House and for the purchase of its current assets from Hilton at book value. The balance of the funds available under the mortgage, together with funds from the operation of the property, will be used for an extensive modernization program of The Palmer House.

Yours very truly,

Hilton Hotels Corporation,
By Conrad N. Hilton,
Chairman of the Board and President.

100

Exhibit "B."

Hilton Hotels.

Offer.

December 17, 1962

To the Holders of Common Stock of
Hilton Hotels Corporation:

Hilton Hotels Corporation (hereinafter referred to as "Hilton") hereby offers to purchase 300,000 of the issued and outstanding shares of Common Stock, par value \$2.50 per share, of Hilton at the price and upon the terms and conditions set forth herein. This offer will remain open until 4:00 o'clock, P.M., Eastern Standard Time, on January 17, 1963. Hilton reserves the right at any time or from time to time to extend said period, by notice to Manufacturers Hanover Trust Company and American National Bank and Trust Company of Chicago, the Depositories, given prior to the initial or any subsequent time for expiration of this offer, but in no event to a date later than January 28, 1963.

There are now outstanding 3,841,362 shares of Common Stock, excluding 694,738 shares in the treasury and 450,000 shares reserved for exercise of warrants originally attached to the 6% Subordinated Sinking Fund Debentures.

Hilton Common Stock is listed on the New York and Pacific Coast Stock Exchanges. The price range for Hilton Common Stock on the New York Stock Exchange for the period January 1, 1962, to and including December 10, 1962, as published by the Commercial and Financial Chronicle, ranged from a high of \$33.625 to a low of \$22.00 per share. The closing price of said stock on the New York

Stock Exchange at the close of business on the date preceding this offer was \$28.125 (herein referred to as the "current market price").

The purpose of Hilton in making this offer is to repurchase a portion of the Common Stock of this corporation equal to the number of shares heretofore issued in connection with the acquisition of certain properties, which properties are no longer owned by this corporation. All shares purchased pursuant to this offer will be added to and become treasury shares. Hilton agrees to accept and pay for the shares of Common Stock tendered in the manner hereinafter set forth, if 300,000 of such shares are so tendered, provided that, if less than that number are so tendered prior to the expiration of this offer, Hilton shall not be obligated to, but may, purchase any of the shares tendered, and if Hilton elects not to purchase said shares, all shares received by the Depositaries will be returned to the depositing stockholders.

Each shareholder accepting this offer shall specify a price between the current market price and \$29.50 per share, at which it will sell the shares tendered and deposited (said price specified by each shareholder is hereinafter called the "tendering price"). Hilton will purchase and pay for shares tendered at a price beginning with the lowest tendering price and graduating to the higher tendering price, but not in excess of \$29.50, as may be required to purchase the tendered shares. On January 18, 1963, Hilton will deposit with the Depositaries the sum of cash sufficient to purchase the tendered shares in accordance with the terms of this offer, the shareholders whose shares are purchased will be paid their respective tendering price for each share tendered, deposited and purchased by Hilton within 72 hours after the expiration of this offer, and said tendered shares will be transferred of record to Hilton.

101 In the event that the purchase by Hilton of all of the shares tendered at any certain tendering price required to obtain at least 300,000 shares would require this corporation to purchase in excess of 300,000 shares tendered (said price being herein referred to as the "maximum price"), Hilton may, in its discretion, but shall not be obligated to, elect to purchase all of said shares tendered at the maximum price. If Hilton shall so elect, it will deposit with the Depositaries, together with the sum required by the preceding paragraph, a sum in cash equal to the aggregate maximum price for all such additional shares, the shareholders will be paid said maximum price for each share deposited within 72 hours after the expiration of this offer, and such additional shares will be transferred of record to Hilton. If Hilton shall not elect to purchase all additional shares, it shall only be required to purchase a portion of the shares tendered by each stockholder at the maximum price, determined by the ratio between the total number of shares required to be purchased at the maximum price to equal 300,000 shares and the total number of shares tendered by all stockholders at the maximum price. Any shares tendered but not purchased will be returned to the depositing stockholders. Hilton will pay all Federal and state stock transfer taxes payable in respect of shares purchased by it.

Mr. Conrad N. Hilton (including shares owned by a corporation controlled by him) and Colonel Henry Crown (including shares held in trust or by family members) and all the officers and directors of Hilton (referred to collectively in this offer and Letter of Transmittal as officers and directors) who, as a group, own a total of 1,185,718 shares of Hilton, have been polled and the officers and directors have agreed to tender in the aggregate ten per cent (10%) of said 1,185,718 shares or a total of 118,572 shares, in the event that the total number of shares ten-

dered and deposited by all other stockholders of Hilton pursuant to this offer does not equal 300,000 shares, provided, however, if the number of shares tendered hereunder by all stockholders other than said officers and directors is between 181,428 and 300,000 shares, the officers and directors shall only tender such number of shares as shall be necessary for the total of all shares tendered hereunder to equal 300,000 shares.

Stockholders of Hilton may accept the offer hereby made by depositing with either of the Depositaries, Manufacturers Hanover Trust Company, 70 Broadway, New York, New York, or American National Bank and Trust Company of Chicago, 33 North La Salle Street, Chicago, Illinois, prior to the expiration of this offer, certificates representing shares of Common Stock, par value \$2.50 per share of Hilton, accompanied by a duly executed Acceptance in the form enclosed with this offer and by duly executed separate stock powers with signatures guaranteed.

For the benefit of Hilton stockholders who are unable to deposit their certificates in the above manner, shares of Hilton stock will be deemed properly tendered if a properly executed Acceptance, accompanied by certificates representing shares of Hilton have been deposited with any commercial bank or trust company in the continental United States, or with any member firm of the New York Stock Exchange and either of the Depositaries shall have received from such bank, trust company or member firm before the expiration of this offer a telegram giving the name of the stockholders, the serial numbers of the certificates deposited and the number of shares of Common Stock of Hilton represented by each such certificate and stating that such certificates together with a duly executed Acceptance have been forwarded by such bank, trust company or member firm by registered mail to one of the Depositaries.

Accordingly, if you desire to accept the offer of Hilton to purchase any of your shares of Common Stock of Hilton, you should execute the enclosed Acceptance and Stock Power and forward the same, together with certificates for your shares, by registered mail, to Manufacturers Hanover Trust Company at 70 Broadway, New York, New York, or to American National Bank and Trust Company of Chicago at 33 North La Salle Street, Chicago, Illinois.

Yours very truly,

Hilton Hotels Corporation,
By Conrad N. Hilton,
*Chairman of the Board and
President.*

Hilton Hotels.

Notice.

January 7, 1963

To the Holders of Common Stock of
Hilton Hotels Corporation

On December 17, 1962, an offer was mailed to all of the stockholders of Hilton Hotels Corporation (hereinafter referred to as "Hilton"), whereby Hilton agreed to purchase 300,000 of its issued and outstanding shares of Common Stock, par value \$2.50 per share, at the price and upon the terms and conditions set forth in the Offer (hereinafter referred to as the "Offer").

Said Offer is hereby amended as follows:

1. Notwithstanding the provision contained in the Offer requiring the officers and directors (as defined in the Offer) to tender up to 10% of their Common Stock, said officers and directors, in addition to any shares they may be obligated to tender under the Offer, may tender any shares of Common Stock owned by them in such amounts, at such tendering price and in the same manner as all other stockholders of this corporation. In the event that any of the officers and directors so tender any of their shares of Common Stock, said officers and directors shall be released, to the extent of the number of shares so tendered, from their obligation to tender up to 10% of their Common Stock under the provisions of the Offer relating to the tender by officers and directors, and the provisions of the Offer relating to the tender by officers and directors shall be adjusted accordingly.

2. Mr. Conrad N. Hilton, Chairman of the Board, President and the principal shareholder of the corporation, has advised the corporation that he will tender 85,847 shares of Common Stock pursuant to the terms of the Offer, which is the number of shares of Common Stock he may have been required to tender under the terms of the Offer.

3. The Offer is hereby extended to 4:00 o'clock P. M., Eastern Standard Time, on January 24, 1963.

Except as modified herein, the Offer and all of the terms and provisions of the same shall remain in full force and effect. In the event that any shareholder who has tendered shares prior to January 7, 1963 pursuant to the Offer desires to change the tendering price (as defined in the Offer) because of anything contained herein, said shareholder may so change the tendering price by sending a letter to either of the Depositaries, specifying their name, address, number of shares tendered, the date tendered, the serial numbers of the certificates deposited and the revised tendering price.

Yours very truly,

Hilton Hotels Corporation,
By Robert P. Williford,
Vice Chairman of the Board.

Hilton Hotels,
Executive Offices,
720 South Michigan Avenue,
Chicago 5, Illinois.

January 7, 1963

To the Stockholders of
Hilton Hotels Corporation

The year 1962 has been a significant one in the existence of your corporation. We have heretofore advised you of the strenuous efforts that are being made to promote new business and to reduce expenses, and, also, in 1962 Hilton Hotels International opened three hotels—Acapuleco, Amsterdam and Trinidad. It is contemplated that twelve hotels will be opened in 1963 or in 1964: Teheran, London, New York, Rotterdam, Rome, Athens, Tokyo, Portland, Montreal (Dorval Airport), San Francisco, Kahala (Hawaii) and Washington, D. C. We are constantly investigating new sites for additional hotels and inns in accordance with our policy of operating hotels in the major cities and other principal locations throughout the world.

Other than the efforts devoted to business promotion and to the reduction of expenses, principal attention during the past year has been given to the strengthening of the capital structure of the corporation and its subsidiaries. All of the outstanding shares of 5% First Preferred Stock, Series A, were called for retirement, and all of the outstanding shares of 5½% Cumulative Voting Preferred Stock, Series A, were redeemed or converted into Common Stock. As a result, your corporation has only Common Stock outstanding.

On December 17, 1962, an offer was made to all of the stockholders to purchase 300,000 shares of the Common Stock of the corporation (hereinafter referred to as the "Offer"). As explained in the Offer, the purpose was to retire shares of Common Stock approximately equal to the number of such shares heretofore issued in connection with the acquisition of certain properties, which properties are no longer owned by the corporation. In the event that 300,000 shares are tendered, the number of shares outstanding will be reduced to 3,541,362.

The response to the Offer has to date been unsatisfactory. In view of this and delays because of the holidays, the time for acceptance of the tender is extended to 4:00 o'clock P. M. Eastern Standard Time, on January 24, 1963. Due to the desire of this corporation to acquire 300,000 shares of its Common Stock for the reasons set forth in the Offer, two amendments are being made to the Offer.

Notwithstanding the provisions contained in the Offer requiring the officers and directors to tender up to 10% of their Common Stock, the officers and directors, in addition to any shares they may be obligated to tender, may tender any shares owned by them in such amounts, at such tendering prices and in the same manner as all other stockholders of the corporation.

104 Under the circumstances, in order to assist the corporation in acquiring the 300,000 shares and in order to reduce the number of shares of outstanding Common Stock for the reasons set forth in the Offer, Mr. Conrad N. Hilton, Chairman of the Board, President and the principal shareholder of your corporation, will tender 85,847 shares of Common Stock to the corporation pursuant to the terms of the Offer. If Mr. Hilton's tender is accepted, Mr. Hilton will own beneficially 815,753 shares of outstanding Common Stock.

Accordingly, Mr. Hilton (including shares owned by a

corporation controlled by him) will not be required to tender any further shares of Common Stock in the event the officers and directors (as defined in the Offer) are called upon to tender up to but not exceeding 10% of their Common Stock, as provided in the Offer. Therefore, an appropriate change will be made to the provisions of the Offer relating to the tender of shares by officers and directors. Although the corporation has not been advised whether or not any of the other officers or directors will tender any shares which they are not required to tender pursuant to the Offer, some of the other officers and directors may tender some of their shares of Common Stock. In the event that any of the other officers and directors so tender any of their shares of Common Stock, said officers and directors shall be released, to the extent of the number of shares so tendered, from their obligation to tender up to 10% of their Common Stock under the provisions of the Offer relating to the tender by officers and directors, and the provisions of the Offer relating to the tender by officers and directors shall be modified accordingly. Your attention is called to the enclosed Notice for further details as to the modification of said Offer.

In addition to the reduction in the classes and amounts of stock outstanding, as aforesaid, this corporation has consummated various transactions in order to reduce the total amount of debt outstanding. A cash payment of \$9,598,000 was made on the System Mortgage, and, in connection with the Palmer House transaction, the Palmer House first mortgage (\$9,200,000) was paid in full. On December 28, the refinancing of the System Mortgage, which had been reduced to \$31,220,000, was affected. A first mortgage of \$12,000,000 was placed on The Statler Hilton Hotel, Washington, D. C., with interest of 5½%, payable in approximately 20 years. In the event of a default under the mortgage, the holder thereof must look solely to the property

for payment of principal and interest. A first mortgage of \$10,000,000 was placed on The Statler Hilton Hotel, Boston, upon similar terms and conditions. This reduced the outstanding balance on the System Mortgage to \$9,220,000. The proceeds of the sale of any Statler properties will be applied toward the payment of this indebtedness.

As a result of said refinancing, the Washington and Boston hotels are no longer subject to the lien of the System Mortgage, and certain covenants restricting your corporation's right to pay dividends and other restrictive covenants have been deleted from the System Mortgage. This will allow your corporation to conduct its affairs with greater flexibility.

During the year, steps were taken to consolidate, simplify and strengthen Hilton's corporate structure by dissolving various subsidiaries or merging the same. As you know, the requisite number of stockholders of Hilton and Statler Hotels Delaware Corporation approved a merger of the two corporations, and on July 23, 1962, said Statler was merged into Hilton. Recently, Metropolitan Hotel Corporation, a wholly owned subsidiary of Hilton, which owns the hotel in Portland now under construction, has been liquidated into your corporation, and The Caribe Hilton Corporation of Delaware, a wholly owned subsidiary of Hilton Hotels International, Inc., has been liquidated into said Hilton Hotels International, Inc.

The funds required to accomplish the various changes in the capital structure of this corporation were derived mainly from the sale of the Savoy Hilton and the Palmer House transaction. The Savoy Hilton was sold for \$24,-

750,000 in cash, but Hilton continues to manage the same under a management agreement. On December

12, as you have been advised, the Palmer House transaction was concluded. Hilton sold the land under the Palmer House for the sum of \$14,000,000 and leased it back

to a wholly owned subsidiary for a term of thirty years with several favorable renewal options. Palmer House Company, a wholly owned subsidiary of this corporation, took down \$10,500,000 out of a \$15,000,000 leasehold mortgage commitment, and will carry out a program of modernizing The Palmer House. On August 7, 1962, The Beverly Hilton garage (which Hilton had constructed next to The Beverly Hilton Hotel) was sold to the owners of The Beverly Hilton Hotel for approximately \$1,000,000 and your corporation leased it back on terms and conditions similar to those previously agreed to with respect to said hotel.

In January of 1962, Hilton Inns, Inc., a wholly owned subsidiary, entered into Note Purchase Agreements with several institutional investors, whereunder such investors have agreed to advance up to \$18,000,000 of financing for the development of the Hilton Inns program. A first takedown of \$8,460,000 was consummated in April. In connection with these borrowings and with part of the proceeds of the same, Hilton Inns acquired the land and buildings comprising the Hilton Inn, Atlanta, Georgia, subject to the existing first mortgage. Your corporation is not liable for the payment of the mortgage notes or other obligations of Hilton Inns under the financing program.

Even though 1963 is only a few days old, we would like to keep you fully advised of events which have already transpired. On January 3, 1963, your Board of Directors, at a special meeting called to consider problems incident to Hilton Credit Corporation, authorized the officers of your corporation to call for tenders of shares of stock of Hilton Credit Corporation at a price of \$3.25 per share, provided that 80% of the stock (2,390,706 shares) of Hilton Credit Corporation, including the shares already owned by your corporation, would be acquired. As you know, your corporation owns 1,000,000 shares of Hilton Credit stock. The officers and directors of this corporation and Hilton Credit

Corporation have agreed to tender their stock, approximately 630,000 shares, at this price. By taking such a course of action, many problems incident to the operation of Hilton Credit Corporation as an affiliate will be eliminated. It is anticipated that official notice of this offer will be sent to the stockholders of Hilton Credit Corporation shortly after January 15, 1963.

Sincerely,

Conrad N. Hilton,
*Chairman of the Board and
President,*
Hilton Hotels Corporation.

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Exhibit "E".

Letter of Transmittal.

January 15, 1963

To the Holders of Common Stock of
Hilton Credit Corporation:

There is enclosed an offer of tender by Hilton Hotels Corporation (hereinafter referred to as "Hilton") which permits you, if you so desire, to tender all or any part of your stock to Hilton.

As you may recall, Hilton organized Hilton Credit Corporation (hereinafter referred to as "Hilton Credit") on October 14, 1958, to take over the existing Hilton credit card activities and to expand them into the all purpose Carte Blanche credit card service. On December 17, 1958, Hilton transferred its list of cardholders, credit files and equipment used in its credit department to Hilton Credit in consideration of the issuance to Hilton of 1,000,000 shares of Hilton Credit's Common Stock.

On January 15, 1959, holders of Common Stock of Hilton were offered the right to purchase, at \$3.25 per share, one share of stock of Hilton Credit for each two shares of Hilton Common Stock held of record at such time. The prospectus pursuant to which the offering was made set forth all of the salient facts. We particularly wish to call your attention to the reference in said prospectus, dated January 15, 1959, in which it was stated that Hilton Credit, as a newcomer in the all purpose credit card field, "may be at a competitive disadvantage with organizations which have already gained public acceptance." From its inception, Hilton Credit has been faced with intense competition from the two principal all purpose credit card companies, the single purpose credit card companies and other businesses and companies offering credit to individuals. Moreover, losses on collections from cardholders and operating costs were greater than anticipated. This resulted in an operating loss of over \$9,000,000 and necessitated a complete reorganization of policies, procedure and personnel.

On March 31, 1963, the Operating Agreement between Hilton Credit and Hilton whereby Hilton Credit purchases all charge accounts created by its cardholders at the various Hilton hotels at a price equal to 97% of the face amount thereof is scheduled to expire. Under the terms of the amendment to the Agreement, Hilton has the option to extend the same for one year and Hilton Credit will be obligated to purchase all of said charge accounts at $\frac{1}{2}$ of one per cent less than the present price. At this time, Hilton has not yet determined whether to exercise such option. Negotiations are now under way. Hilton Credit has in recent months operated at a profit. This would not be possible without the business derived from Hilton.

As you know, Hilton Credit is obligated on notes to various banks in the aggregate amount of \$12,150,000, which mature under their respective terms on February 28, 1963.

107 Under the terms of an Extension Agreement, dated

February 9, 1962 with said banks, Hilton Credit has the option to extend the maturities of said notes to February 28, 1964, provided, among other things, that the \$5,000,000 Subordinated Notes, due March 1, 1963, have been extended to a date not earlier than March 1, 1964. Hilton Hotels holds \$1,900,000 of said Subordinated Notes and has agreed to extend the maturity of the same until March 1, 1964, if all of the other holders of said Subordinated Notes similarly agree. Although all of the other holders of such Subordinated Notes have not agreed to extend their maturity as yet, it is anticipated that said holders will so agree to extend the maturity of the Subordinated Notes until March 1, 1964. Accordingly, it is anticipated that the maturities of the bank loans will be extended to February 28, 1964. There is no provision for the extension of the bank loans or the Subordinated Notes after February 28, 1964 and March 1, 1964, respectively. As a result, Hilton feels that it may be required to take a major role in any refinancing of such indebtedness.

Under the circumstances, the Board of Directors of Hilton has authorized the making of an offer to Hilton Credit Stockholders to purchase 80% of the outstanding shares of Common Stock of Hilton Credit, including the shares already owned by Hilton, for \$3.25 per share upon the terms and conditions set forth in the enclosed formal offer. Hilton has no intention of merging with Hilton Credit.

For your further information, the recent general range in the market prices for shares of Common Stock of Hilton Credit is indicated by the following quotation taken from

information furnished by the National Monthly Stock Summary published by the National Quotation Bureau:

| Period | Bid | | Asked | |
|----------------------------------|---------------------|-----------------|-----------------------|------------------|
| | High | Low | High | Low |
| Quarter ended March 31, 1962 | 2 $\frac{7}{8}$ | 2 $\frac{1}{8}$ | 3 $\frac{1}{4}$ | 2 $\frac{1}{16}$ |
| Quarter ended June 30, 1962 | 3 $\frac{1}{8}$ | 2 $\frac{3}{4}$ | 3 $\frac{3}{8}$ | 3 |
| Quarter ended September 30, 1962 | 2 $\frac{3}{8}$ | 2 $\frac{1}{4}$ | 3 | 2 $\frac{1}{2}$ |
| Month of October, 1962 | 2 $\frac{1}{4}$ | 1 $\frac{7}{8}$ | 2 $\frac{1}{4}$ | 2 $\frac{1}{8}$ |
| Month of November, 1962 | 2 $\frac{3}{8}$ | 2 | 3 | 2 $\frac{1}{2}$ |
| January 10, 1963* | Bid 3 $\frac{1}{8}$ | | Asked 3 $\frac{1}{2}$ | |

* From the National Daily Quotation Service

For your further information, there are included with this letter, in addition to the formal offer of Hilton and a form of acceptance (and separate stock power), unaudited financial statements of Hilton Credit comprising a balance sheet as at December 31, 1962, and statement of consolidated earnings and deficit for the eight month period then ended.

Certain of the officers and directors of Hilton and Hilton Credit, who own, directly or indirectly, 651,617 shares of Hilton Credit Common Stock, have agreed to accept Hilton's offer, subject, however, to the right of the other stockholders if they so desire to tender their stock as set forth in the enclosed offer.

Yours very truly,

Hilton Hotels Corporation,
By Conrad N. Hilton,
Chairman of the Board and President.

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Hilton Credit Corporation

CONSOLIDATED BALANCE SHEET

(Unaudited) (1)

at December 31, 1962

ASSETS

Current Assets

| | | |
|--|-----------------|-----------------|
| Cash, U. S. Treasury bills and bank certificates of deposit..... | | \$ 7,613,500.29 |
| Accounts receivable | \$10,178,358.62 | |
| Less allowance for credit losses..... | 586,677.76 | 9,591,680.86 |
| Prepaid expenses | | 163,508.35 |

Total Current Assets.....

17,368,689.50

Fixed Assets—(at cost)

767,886.77

Less allowance for depreciation.....

239,715.11

528,171.66

Customer Lists, Plates, Goodwill and Other Intangible Assets—at cost less amortization of \$372,666.68.....

647,333.32

Deferred Charges

217,358.67

Total Assets

\$18,761,553.15

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities

| | | |
|---|--|-----------------|
| Notes payable to banks(2)..... | | \$12,150,000.00 |
| Accounts payable | | 2,482,716.28 |
| Accrued expenses | | 418,069.17 |
| Mortgage payable | | 6,000.00 |
| Subordinated notes payable due March 1, 1963(3) | | 5,000,000.00 |

Total Current Liabilities.....

20,056,785.45

Deferred Income

178,161.34

Reserve for Foreign Exchange.....

17,450.00

Long-Term Debt

Mortgage payable

\$ 42,000.00

Less portion payable within one year..

6,000.00

36,000.00

Stockholders' Equity—(Deficit):

Common stock, par value \$1.00 per share

Authorized 5,000,000 shares

Issued and outstanding 2,988,383 shares

2,988,383.00

Additional paid-in capital.....

4,346,528.36

Retained earnings—(Deficit).....

(8,861,755.00)

Total Stockholders' Equity—

(Deficit)

(1,526,843.64)

Total Liabilities and Deficit in Stockholders' Equity

\$18,761,553.15

Notes to Financial Statements form an integral part of this statement and should be considered in connection therewith.

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Hilton Credit Corporation

STATEMENT OF CONSOLIDATED EARNINGS AND DEFICIT

(Unaudited) (1)

For the Eight Months Ended December 31, 1962

Revenue

| | |
|--|---------------------|
| Discount income and membership fees..... | \$ 4,456,602.34 |
| Other income | 269,497.97 |
| Total Revenue | <u>4,726,100.31</u> |

Costs and Expenses

| | |
|---|------------|
| Data processing and card issue..... | 773,533.83 |
| Sales and associate services | 151,680.39 |
| Advertising and publicity | 438,806.00 |
| Credit investigation and collection | 996,618.18 |
| Provision for credit losses | 622,374.33 |
| Administrative and general | 215,508.73 |
| Depreciation and amortization | 132,121.51 |
| Interest | 446,116.59 |
| Other | 149,894.64 |

| | |
|--------------------------------|---------------------|
| Total Costs and Expenses | <u>3,926,054.26</u> |
|--------------------------------|---------------------|

| | |
|--------------------------------------|---------------------------------|
| Net Profit | 799,446.05 |
| (Deficit) At April 30, 1962 | (9,661,201.05) |
| (Deficit) At December 31, 1962 | <u><u>\$ (8,861,755.00)</u></u> |

Notes to Financial Statements form an integral part of this statement and should be considered in connection therewith.

NOTES TO FINANCIAL STATEMENTS

For the Eight Month Period Ended December 31, 1962

Note 1:

The figures contained in the Consolidated Balance Sheet and Statement of Consolidated Earnings and Deficit have been prepared by Hilton Credit Corporation and have not been examined by any Certified Public Accountants.

Note 2:

These Notes bear interest at $4\frac{1}{2}\%$ per annum. For further information with respect to the bank loans, reference is made to the Letter of Transmittal.

Note 3:

These Notes bear interest at 5% per annum. For further information with respect to the Subordinated Notes, reference is made to the Letter of Transmittal.

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Exhibit "F".

Hilton Hotels

Offer.

January 15, 1963

To the Holders of Common Stock of
Hilton Credit Corporation:

Hilton Hotels Corporation (hereinafter referred to as "Hilton") hereby offers to purchase at a price of \$3.25 per share, payable in cash, 1,390,706 of the issued and outstanding shares of Common Stock, par value \$1.00 per share, of Hilton Credit Corporation (hereinafter referred to as "Hilton Credit") upon the terms and conditions set forth herein. This offer will remain open until 4:00 o'clock P. M., Eastern Standard Time, on February 5, 1963. Hilton reserves the right at any time or from time to time to extend said period, by notice to Manufacturers Hanover Trust Company and American National Bank and Trust Company of Chicago, the Depositaries, given prior to the initial or any subsequent time for expiration of this offer, but in no event to a date later than February 15, 1963.

The purpose of Hilton in making this offer is to acquire 80% of the 2,988,383 issued and outstanding shares of Common Stock of Hilton Credit, namely, 2,390,706 shares (which includes 1,000,00 shares of Common Stock owned by Hilton) for the reasons set forth in the enclosed letter of transmittal. Hilton agrees to accept and pay for the shares of Common Stock of Hilton Credit tendered in the manner hereinafter set forth, if 1,390,706 of such shares (including shares tendered by the persons named in the following paragraph of this offer) are so tendered, provided that if less than that number are so tendered prior

to the expiration of this offer, Hilton shall not be obligated to purchase any of the shares tendered but in its sole discretion may elect to purchase all but not less than all of the shares tendered, and if Hilton elects not to purchase said shares, all shares of Common Stock of Hilton Credit received by the Depositaries will be returned to the depositing stockholders. If 1,390,706 or a greater number of said shares are deposited prior to the expiration of this offer, Hilton will deposit with the Depositaries the aggregate sum of \$4,519,794.50 in cash and thereupon 1,390,706 of the deposited shares will be transferred of record to Hilton. If more than 1,390,706 of said shares have been and remain so deposited after the reduction of the tenders referred to in the following paragraph of this offer has been made, a proportionate part of the shares tendered by each stockholder, determined by the ratio between the aggregate number of shares remaining on deposit and 1,390,706 (adjusted so as to avoid fractional shares), will be so transferred of record to Hilton and the remaining shares will be returned to the depositing stockholders, provided that Hilton may in its discretion, but shall not be obligated to, elect to purchase all of the shares of Common Stock of Hilton Credit in excess of 1,390,706 held by the Depositaries (including all shares tendered by the persons named in the following paragraph of this offer). If Hilton shall so elect, it will deposit with the Depositaries a sum in cash equal to the aggregate price payable for all such additional shares so purchased and such additional deposited shares will be transferred of record to Hilton. Hilton will pay all Federal and state stock transfer taxes payable in respect of shares purchased by it.

Mr. Conrad N. Hilton (including shares owned by a corporation controlled by him) and Colonel Henry Crown (including shares owned by a corporation controlled 111 by him) and certain officers and directors of Hilton and Hilton Credit named below who own Common

Stock of Hilton Credit (referred to collectively in this offer and letter of transmittal as officers and directors) have agreed to tender and deposit all shares of said Common Stock of Hilton Credit owned by said officers and directors as set forth below opposite their respective names:

| | |
|--|----------------|
| Conrad N. Hilton (including a corporation controlled by him)..... | 375,967 |
| W. Barron Hilton..... | 126,392 |
| Colonel Henry Crown (including a corporation controlled by him)..... | 70,631 |
| Conrad N. Hilton Foundation..... | 28,334 |
| Charles L. Fletcher..... | 24,100 |
| Robert P. Williford..... | 14,150 |
| Vernon Herndon | 4,408 |
| Lynn H. Montjoy..... | 3,000 |
| Porter P. Parris..... | 1,910 |
| H. R. Randall..... | 1,021 |
| C. N. Hilton, Jr..... | 691 |
| Robert F. Quain..... | 539 |
| Robert J. Caverly..... | 464 |
| Frank G. Wangeman..... | 10 |
| Total..... | <u>651,617</u> |

upon the condition that if the aggregate number of shares of such Common Stock, including their shares, tendered and deposited shall exceed 1,390,706, and Hilton shall not elect to purchase all of the shares of such Common Stock in excess of 1,390,706 held by the Depositaries, the number of shares tendered by each of the officers and directors will be proportionately reduced so that the aggregate number of shares tendered and deposited shall be 1,390,706.

Stockholders of Hilton Credit may accept the offer hereby made by depositing with either of the Depositaries, Manufacturers Hanover Trust Company, 40 Wall Street, New York, New York, or American National Bank and Trust Company of Chicago, 33 North La Salle Street,

Chicago, Illinois, prior to the expiration of this offer, certificates representing shares of Common Stock, par value \$1.00 per share, of Hilton Credit, accompanied by a duly executed Acceptance in the form enclosed with this offer and by duly executed separate stock powers with signatures guaranteed.

For the benefit of Hilton Credit stockholders who are unable to deposit their certificates in the above manner, shares of Hilton Credit stock will be deemed properly tendered if a properly executed Acceptance, accompanied by certificates representing shares of Hilton Credit have been deposited with any commercial bank or trust company in the continental United States, or with any member firm of the New York Stock Exchange and either of the Depositories shall have received from such bank, trust company or member firm before the expiration of this offer a telegram giving the name of the stockholder, the serial numbers of the certificates deposited and the number of shares of Common Stock of Hilton Credit represented by each such certificate and stating that such certificates together with a duly executed Acceptance have been forwarded by such bank, trust company or member firm by registered mail to one of the Depositories.

Accordingly, if you desire to accept the offer of Hilton to purchase your shares of Common Stock of Hilton Credit, you should execute the enclosed Acceptance and Stock Power and forward the same, together with certificates for your shares, by registered mail, insured, to Manufacturers Hanover Trust Company at 40 Wall Street, New York, New York, or to American National Bank and Trust Company of Chicago at 33 North La Salle Street, Chicago, Illinois.

Yours very truly,

Hilton Hotels Corporation,

By Conrad N. Hilton,

Chairman of the Board and President.

112

UNITED STATES DISTRICT COURT.
• • (Caption—63-C-2248) • •

AFFIDAVIT EVIDENCING COMPLIANCE WITH
GENERAL RULE 39.

(As Amended December 14, 1962).

Affiant is the attorney of record for Dora Surowitz, individually and on behalf of all other similarly situated shareholders of Hilton Hotels Corporation, and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"):

No exception.

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"):

No exception.

David R. Kentoff,

Affiant.

Subscribed and sworn to before me this 13th day of
December A. D. 1963.

Beatrice Sullivan,

(Seal)

Notary Public.

113

UNITED STATES DISTRICT COURT.

• • (Caption—63-C-2248) • •

AFFIDAVIT EVIDENCING COMPLIANCE WITH
GENERAL RULE 39.

(As Amended December 14, 1962.)

Affiant is the attorney of record for Dora Surowitz, individually and on behalf of all other similarly situated shareholders of Hilton Hotels Corporation, and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"):

No exception.

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"):

No exception.

Walter J. Rockler,

Affiant.

Subscribed and sworn to before me this 13th day of December A. D. 1963.

Beatrice Sullivan,

(Seal)

Notary Public.

114

UNITED STATES DISTRICT COURT.
• • (Caption—63-C-2248) • •

**AFFIDAVIT EVIDENCING COMPLIANCE WITH
GENERAL RULE 39.**

(As Amended December 14, 1962.)

Affiant is the attorney of record for Dora Surowitz, individually and on behalf of all other similarly situated shareholders of Hilton Hotels Corporation, and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"):

No exception.

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"):

No exception.

Richard F. Watt,

Affiant.

Subscribed and sworn to before me this 13th day of December A. D. 1963.

(Seal)

Notary Public.

AFFIDAVIT EVIDENCING COMPLIANCE WITH
GENERAL RULE 39.

(As Amended December 14, 1962.)

Affiant is the attorney of record for Droa Surowitz, and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"):

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exceptions"):

Howard L. Kostil,

Affiant.

Subscribed and sworn to before me this 24th day of Feb. A.D. 1964.

James T. Baloz,

(Seal)

*Notary Public.**Deputy Clerk.*

145 State of Illinois, }
County of Cook. } ss.

AFFIDAVIT.

1. I, E. T. Cassin, am a Trust Officer and an Assistant Secretary of the First National Bank of Chicago.

2. The First National Bank is the transfer agent for Hilton Hotels Corporation, and has been such since June 13, 1946.

3. We have reviewed the open and closed ledgers from January 1, 1957 to the present.

4. The records indicate that Mrs. Dora Surowitz, 1299 Ocean Avenue, Brooklyn, New York, owns 100 shares of Hilton common stock, Certificate No. 100897, dated October 10, 1963, and that said Dora Surowitz has been a stockholder of record since said October 10, 1963.

E. T. Cassin.

Subscribed and sworn to before me this 25th day of February, 1964.

Norman Neher,

(Seal)

Notary Public.

My commission expires Dec. 16, 1966.

146 IN THE UNITED STATES DISTRICT COURT.
 * * (Caption—63-C-2248) * *

The deposition of Dora Surowitz, the plaintiff herein, called for examination pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Court pertaining to the taking of depositions for the purpose of discovery, taken before Dorothy L. Brackenbury, a notary public within and for the County of Cook and State of Illinois at 135 South LaSalle Street, Chicago, Illinois, on Tuesday, February 25, 1964, at the hour of 10:00 o'clock a.m.

Present:

Mr. Richard F. Watt and Mr. Walter J. Rockler, on behalf of plaintiff;

Mr. Samuel W. Block, Mr. John J. Crown, and Mr. Keith F. Bode, on behalf of defendant Henry Crown;

147 Mr. William J. Friedman and Mr. Stanley R. Zax, on behalf of Defendants Lawrence Stern, Willard Keith and Spearl Ellison;

Mr. Don H. Reuben and Mr. Lawrence Gunnels, on behalf of defendant Hilton Hotels Corporation.

148 DORA SUROWITZ, having been first duly sworn, deposeth and saith as follows:

Examination by Mr. Block.

Q. Mrs. Surowitz, will you state your name and residence address, please?

A. Yes. Dora Surowitz, D-o-r-a S-u-r-o-w-i-t-z, 1299 Ocean Avenue, Brooklyn, New York.

Q. What is your business or occupation, Mrs. Surowitz?

A. Dressmaker.

Q. For whom or by whom are you employed?

A. Marlou Dress Company.

Q. Will you spell that, please?

A. M-a-r-l-o-u.

Q. Where is that located?

A. That is 265 West 40th Street.

Q. In Manhattan?

A. Manhattan.

Q. How long have you been employed there?

A. Thirteen years in November. It is going on fourteen years.

Q. Do you have any property interest in the dress 149 company by whom you are employed?

A. No, just my salary, that's all.

Q. Are you the Dora Surowitz who signed the complaint in the cause entitled Dora Surowitz *vs.* Hilton Hotels Corporation, et al.?

A. Yes.

Q. Did you read the complaint prior to the time that you signed it?

A. It was written by somebody. My son-in-law read it to me.

Q. Where was your son-in-law when he read it to you?

A. We were at home.

Q. What is your son-in-law's name?

A. Irving Brilliant.

Q. Will you spell that?

A. B-r-i-l-l—

Mr. Rockler: -i-a-n-t.

By Mr. Block:

Q. What is Mr. Brilliant's business or occupation?

A. I don't know what he is doing.

Q. You don't know what he is doing. Can you tell us what Mr. Brilliant said to you when he brought this complaint to you and read it to you?

150 A. He just explained it to me, certain documents which I understood, to sign.

Q. Had you discussed this document with Mr. Brilliant before the day you signed it?

A. We discussed it not too much because I left it to him.

Q. When did you first discuss with Mr. Brilliant the complaint that you signed?

A. Well, he told me what it's all about, and I signed.

Q. Did you sign it on December 13, 1963—Strike that.

A. I guess so. I don't remember the date. It must have been about that date what you have it there.

Q. Did you sign it on or about December 12, 1963?

A. Sometime. I don't remember exactly the date. I really can't tell you. I don't remember.

Q. When prior to the time you signed it did you first discuss this complaint with Mr. Brilliant?

A. Well, I left it to him and that is what he told me to do.

Q. So that the first time you discussed this complaint with Mr. Brilliant was the time that he read it to you
151 and you signed it, he told you what to do?

A. Yes, sir.

Q. When did you acquire your shares of stock in Hilton Hotels Corporation?

A. It was about 1957.

Q. How many shares do you own?

A. 100.

Q. Have you ever bought any additional shares from the first purchase or did you buy 100 shares on the first time?

A. No, we bought it—I don't remember. I can't tell you. I don't remember. This is—I really don't know. I gave money, I gave him the money, and he invested it, but how he bought it or what he bought, I don't remember.

Q. When you say he, you mean Mr. Brilliant?

A. Yes.

Q. Now, Mrs. Surowitz—

Mr. Block: Would you read back the answer to the question as to when she—well, it is easier to start over.

By Mr. Block:

Q. Do you recall what year in which you purchased 152 those shares?

A. I don't remember.

Q. Have you done any trading at all in Hilton Hotels Corporation stock, Mrs. Surowitz, buying and selling the stock?

A. I don't think so. I don't remember. I don't remember what he—I really don't remember.

Q. I show you a letter dated January 22, 1963, addressed to the Hilton Hotels Corporation and signed, "Dora Surowitz," which I will ask to have identified as Defendant's Surowitz Deposition Exhibit No. 1—

(Said document was thereupon marked Defendant's Surowitz Deposition Exhibit No. 1 for identification.)

By Mr. Block:

Q. Is that your signature on that letter?

A. Yes, this is mine (indicating).

Mr. Reuben: No, that is the marking.

The Witness: This (indicating).

By Mr. Block:

Q. Down at the bottom, Mrs. Surowitz.

A. It looks like my handwriting here.

153 Yes, right here (indicating). It looks like mine.

Q. Did Mr. Brilliant bring you Exhibit No. 1 for you to sign?

A. Yes.

Q. Did you discuss that document with him at any time prior to the date on which you signed it?

A. No, I didn't.

Q. Can you tell us, Mrs. Surowitz, why you did not tender your shares of stock pursuant to the offer which is attached to your complaint?

A. I don't know. Can you explain to me what you mean? I don't understand what you are talking about.

154 Q. Did you understand that there was a solicitation for tender of Hilton Hotels Corporation stock made by Hilton Hotels Corporation?

A. What does it mean, "tender"? I don't understand the word.

Q. Under what name are these shares held, Mrs. Surowitz?

A. Under my own.

Q. And do you hold any of the shares beneficially other than in your own name? Does anyone hold any shares for you?

A. No.

Q. Did you consult with anyone other than Mr. Brilliant prior to the time that you wrote the letter which is Exhibit No. 1 about its terms?

A. Just with Mr. Brilliant.

Q. And you don't recall now what Mr. Brilliant's business or occupation is?

A. I don't know.

Q. Is the name "149 Fifth Avenue Corporation" familiar to you, Mrs. Surowitz?

A. I don't know. I never knew where he works or what he does.

Q. Did you ever meet Mr. Watt sitting at your left
155 before you came to Chicago this time?

A. This fellow (indicating)?

Q. Yes.

A. I met him yesterday only.

Q. Did you ever meet this gentleman, Mr. Rockler, before yesterday?

A. Yes, I met him once.

Q. Where did you meet him?

A. He came into my home.

Q. When did he come into your home?

A. A couple of months ago. I don't remember what date it was.

Q. Was it before or after you signed the complaint in this case?

A. I really don't remember whether it was before or after. I can't recall.

Q. Who brought him to your home, Mrs. Surowitz?

A. My son-in-law.

Q. Mr. Brilliant?

A. Yes.

Q. Did you call Mr. Rockler and ask him to come to your home?

A. No, I didn't call him.

Q. Have you agreed to pay any fee to Mr. Rockler?

156 Mr. Watt: I think I am going to object to the question. I don't think that the fee arrangements that are involved here have any relevancy or materiality to the case.

Mr. Block: Would you answer the question? She will read it back.

Mr. Watt: I am going to instruct the witness not to answer.

By Mr. Block:

Q. Do you refuse to answer the question?

A. Yes.

Q. Do you have any fee arrangements with Mr. Brilliant?

A. No.

Q. Do you have any fee arrangements with Mr. Watt?

A. No.

Q. Have you paid the filing fee for filing Surowitz vs. Hilton Hotels Corporation?

Mr. Watt: I object to the question and I instruct the witness not to answer.

By Mr. Block:

Q. You refuse to answer that question, Mrs. Surowitz?

A. Yes.

Q. After Mr. Brilliant read the complaint in this 157 to you, did you then immediately sign it?

A. After he read it, I signed it.

Q. You made no changes in it from the way he read it to you, did you?

A. No.

Q. Do you have any claims or causes of action against the defendants in this case other than those which were set forth in the complaint, Mrs. Surowitz?

A. What do you mean by that? Can you explain it to me?

Q. You don't understand that question?

A. I don't.

Q. Except for Exhibit No. 1 which is that letter—would you hand that back to Mrs. Surowitz?—have you had any other correspondence with any of the defendants in this case?

A. I don't remember of anything like that.

Q. Have you turned over all the correspondence that you have had with any of the defendants to your attorney?

A. I turned it over to my son-in-law.

Q. Mr. Brilliant?

A. Mr. Brilliant, yes.

Q. Have you ever had any conversations with any 158 of the individual defendants in this case?

A. Not me.

Q. Have any such conversations ever been reported to you, Mrs. Surowitz?

A. Not that I know about.

Q. Have you ever made any demand on Hilton Hotels Corporation to bring this action other than the letter which is Exhibit No. 1?

A. What do you mean by it? Can you explain to me just that question?

Mr. Block: Read the question back, please.

(Question read.)

By the Witness:

A. I don't remember anything like that. I don't know.

159 By Mr. Block:

Q. You don't understand that question?

A. I don't know. I don't understand it. I don't know what to answer you on that.

Q. Do you know personally any of the defendants in this case, and I will read their names to you, Mrs. Surowitz: Conrad N. Hilton, Robert P. Williford, Robert J. Caverly, Joseph P. Binns, Spearl Ellison, Henry Crown, Horace C. Flanigan, Benno M. Bechhold, Y. Frank Freeman, Willard W. Keith, Lawrence Stern, Sam D. Young, Fritz B. Burns, Vernon Herndon, Herbert C. Blunck, Charles L. Fletcher, Robert A. Groves, Joseph A. Harper, Barron Hilton.

Do you know any of those people?

A. No.

Q. Do you know anything at all about them that would indicate that they are not in your judgment men of honesty and integrity?

A. I don't know anything about them.

Q. Mrs. Surowitz, your affidavit which you signed on December 12, 1963, indicates that you have information and belief as to all of the matters alleged in the complaint except those specifically enumerated in your affidavit, 160 and I am going to ask you about each one of these paragraphs.

Paragraph 6 which you allege as being to your knowledge true and correct states that:

"In December of 1962 and January of 1963, the individual defendants, as the officers and directors having control over the affairs of the defendant Hilton Hotels Corporation, caused the defendant corporation to issue a document entitled, 'Letter of Transmittal,'" and so forth.

Can you tell me on what basis you make the statement that these individual defendants had control over the affairs of the Hilton Hotels Corporation?

A. I don't understand it and I don't know nothing about it.

Q. Would your answer be the same if I asked you about paragraphs 6 and 7 of counts 1, 2, 3, 4, and 5, the last sentence of paragraph 13 in counts 1, 2, 5 and 6, and the last sentence in paragraph 10 of counts 3 and 4, paragraph 5 of count 6, the last sentence in paragraph 14 of 161 counts 7, 8 and 11, and the last sentence of paragraph 12 of counts 9 and 10?

Mr. Watt: I object to the question. No witness under any circumstances could answer a question such as that unless the precise language which is referred to in each of those paragraphs or sentences is shown to the witness.

Mr. Block: You don't have to say anything more. I am glad to go through each sentence and I am willing to pay the cost of the reporter if the answer isn't the same. You just take all the time you want, Mr. Watt, believe me.

By Mr. Block:

Q. Paragraph 7 alleges:

"In making the offer above described, the individual defendants stated in writing, in the Offer of December 17, 1962 (Exhibit B attached hereto), which document was transmitted through the United States Mails to shareholders of the defendant corporation, the reason why the offer was being made, as follows—"

162 and there follows a quotation:

"No other statement of reasons appears in any of the above-designated documents."

Upon what facts do you make that statement under oath, Mrs. Surowitz?

A. I don't know nothing, I don't understand this, and I don't know, I can't answer you on that. I don't know.

163 Q. The last sentence of paragraph 13 alleges:

"Plaintiff has heretofore protested to the defendant corporation against the gross impropriety of the acts set forth above."

Will you tell me the facts upon which you made that allegation under oath? Would your answer be the same?

A. I don't know.

Q. You don't understand it?

A. I don't know nothing about it.

Q. That same sentence appears as the last sentence of paragraph 10 of Counts 3 and 4. Would your answer be the same to my question concerning the factual basis for that allegation?

A. I don't know. I can't answer you on that neither because I don't know.

Q. Paragraph 5 of Count 6 alleges the following:

"This action is not a collusive one instituted for the

purpose of conferring upon a court of the United States jurisdiction of a cause of action over which it would not otherwise have jurisdiction."

164 Can you give me the factual basis upon which that allegation is made under oath?

A. I don't know. I can't tell.

Mr. Reuben: Mr. Watt, why don't you stipulate with Mr. Block—

Mr. Block: Now look, I am not going to ask for any stipulations from Mr. Watt. If you want to ask the questions, you can do it. At the moment I will ask them.

By Mr. Block:

Q. The last sentence of paragraph 14 of Counts 7, 8 and 11 reads as follows:

"Plaintiff has heretofore protested to the defendant corporation against the gross impropriety of the acts set forth above."

Can you give me the factual basis upon which that allegation is made under oath, Mrs. Surowitz?

A. I can't. I don't know.

Q. Now—

Mr. Crown: Could I have that answer read back? I didn't hear the last part of it.

(Record read.)

165 By Mr. Block:

Q. The last sentence of paragraph 12 of Counts 9 and 10 reads:

"Plaintiff has heretofore protested to the defendant corporation against the gross impropriety of the acts set forth above."

Can you tell me the factual basis upon which you made that statement under oath, Mrs. Surowitz?

A. No, I don't understand it.

Q. Now the balance of the entire complaint you have alleged as having been made on information and belief, and you believe them to be true. Can you tell me the information you have with respect to the following allegation, paragraph 8 of Count 1:

"Said explanation being that set forth in paragraph 7 was false and misleading and was known by the individual defendants to be false and misleading in the respects indicated hereinafter."

Mr. Block: Would you read that question back?
(Record read.)

166 The Witness: I can't give it to you because I can't explain it to you and I don't know.

By Mr. Block:

Q. Do you know of any action, wrongful or improper, done by any officers or directors of Hilton Hotels Corporation, Mrs. Surowitz?

A. I couldn't—all I know is that my stock wasn't right and that's all.

Q. The second sentence of paragraph 8 reads:

"Said false and misleading statement, the offer to purchase 300,000 shares of common stock described above, and the documents specified above which were sent out by the individual defendants to the shareholders, were integral parts of a manipulative and deceptive device or contrivance and of a scheme to defraud and constituted acts and practices carried out in the execution of said device and scheme all in violation of a specified provision of the Securities & Exchange Act."

Can you give me the information upon which you
167 formed the belief that this manipulative or deceptive device or contrivance was carried on?

A. I can't explain it to you in my words. I don't know.

Q. Paragraph 8-A alleges that:

"The individual defendants were engaged in a plan and scheme to make it possible for defendant Conrad Hilton and other officers and directors to dispose of shares in the defendant corporation at prices more favorable than they could obtain on the market at the time when they knew or should have known that the business affairs of the defendant corporation would shortly lead to a substantial drop in the value of the shares."

Can you give me the information upon which you formed the belief that is set forth in that sentence, Mrs. Surowitz?

A. I don't know. I can't explain it.

168 Q. You have charged in the second sentence of 8(a) that:

"Furthermore, the individual defendants were engaged in a plan and scheme to make it possible for defendant Henry Crown to dispose of large holdings in the common stock of the defendant Corporation held by him individually, by other entities controlled by him, by members of his family, and by trusts established for various members of his family, as to some of which he was grantor, beneficiary, or remainderman, at prices above the market prices for such stock, under circumstances whereby such disposal of stock would not become publicly known."

Can you tell me the facts upon which you base that charge?

A. I don't know.

Q. Paragraph 8(b), count 1, charges:

"The individual defendants acted in such a way as to conceal from the defendant Corporation and from

169 its stockholders the true purpose of the offer to purchase described above, and in such a way as to make it appear that it was to the Corporation's advantage to effect such a purchase of approximately 10 per cent of its outstanding shares."

Can you tell me the facts upon which you made that allegation?

A. No, I don't know. I don't know.

Q. Do you know any facts, Mrs. Surowitz, at all upon which you based these allegations?

A. I don't know. I can't give you no facts because I don't understand it.

Mr. Block: Could we take a short recess, please?

(Whereupon a five minute recess was taken.)

Mr. Block: Let the record show that Mr. Watt and Mr. Block have now discussed the further questioning with respect to the information upon which the witness has formed the belief to which she swore and it is agreeable
170 that I ask the following question:

By Mr. Block:

Q. Mrs. Surowitz, if I ask you about each of the other allegations of the complaint to which you have sworn on information and belief as being true and correct and that you believe them to be true and correct, your answer would be the same, would it not, that you have no information as to those?

A. I have no information because my son-in-law, I left it to him, and he was the one that knew all about it.

Q. When did you come to Chicago, Mrs. Surowitz?

A. Yesterday.

Q. Where did you stay last night?

A. By Mr. Rockler.

Q. With Mr. Rockler?

A. Yes.

Q. Who paid your way to Chicago?

A. My son-in-law.

Q. Did you pay the filing fee for this lawsuit?

Mr. Watt: I object to the question. That has already been covered.

Mr. Block: You are right.

171 Mr. Watt: I instruct the witness not to answer.

By Mr. Block:

Q. Do you have any agreement with respect to the payment for the filing fee or other costs and disbursements in this lawsuit?

A. I have no agreement.

Mr. Watt: I object to the question.

Mr. Block: The question has been asked and answered.

Mr. Watt: I didn't hear the answer, if there was an answer.

Mr. Block: Would you read the answer back, please?

(Answer read by the reporter.)

Mr. Reuben: I would like to ask you—

Mr. Watt: Is Mr. Block through?

Mr. Reuben: I thought he was.

Mr. Block: No.

By Mr. Block:

Q. Your son-in-law, Mrs. Surowitz, is named Irving Brilliant. How long has he been married to your daughter?

A. Nine years, going on ten.

172 Q. Do they live with you?

A. No.

Mr. Block: That is all. Thank you very much.

Would you waive signature?

Mr. Watt: May we have about five minutes? There may be some questions I would want to put to the witness.

(Whereupon the plaintiff and counsel left the conference room at 11:10 a.m.)

Mr. Block: Let the record show that Mrs. Surowitz left the room with her attorney.

(Whereupon the deposition was resumed at 11:20 a.m.)

Mr. Watt: I just have a few questions.

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Examination by Mr. Watt.

Q. Mrs. Surowitz, let me show you a document which is attached to the complaint as Exhibit A which bears the date December 17, 1962. That is a copy. Do you recall receiving such a document?

A. Yes.

Q. Is the date December 17, 1962, about the date when you received it?

A. About that.

Q. When you received that, what, if anything, did you do?

A. I turned it over to my son-in-law.

Q. Did you at that time ask him anything about it?

A. I asked him and he said that there is something wrong with the stock.

Mr. Block: I will move to strike the answer.

By Mr. Watt:

Q. Do you recall receiving any of the other documents such as Exhibit B and C on the approximate dates which appear on them?

A. I had these letters that I received and I turned them over to him and he handled it, Mr. Brilliant, he took
174 care of it.

Mr. Watt: Do you have the document which you marked as Exhibit 1?

Mr. Block: Yes (handing document to counsel).

By Mr. Watt:

Q. There has been marked a document as Deposition Exhibit No. 1, Mrs. Surowitz. I believe you have identified your signature?

A. Yes.

Q. Did you have any discussion about Hilton Hotels Corporation at the time Mr. Brilliant brought that to you?

Mr. Block: Just a minute. I will object to the form of that question.

By Mr. Watt:

Q. Just go ahead and answer, please, Mrs. Surowitz.

A. Yes, I had this letter, and he discussed it with me and he said that he would like to take action against—

Q. Did you finish your answer?

A. He said he would take care of it, that's all. I left it to him. I left all these things to him because he knows more about it.

175 Q. Do you own other stocks, that is, other than Hilton Hotels Corporation?

A. Yes.

Q. Do you know approximately when you first purchased any stock at all in any corporation?

A. I don't remember when I had it purchased. I had some money and I gave it to him whenever it was ready, he invested it for me.

Q. Was the procedure you used—

Mr. Zax: Would you read back the last question and answer? There was some confusion here.

(Record read by the reporter.)

By Mr. Watt:

Q. The "him" that you used in that answer—

A. Mr. Brilliant, my son-in-law.

Q. And was the procedure you used for buying stock the same, you turned money over to Mr. Brilliant?

A. I turned money over to Mr. Brilliant.

Q. Just so we have the information on the record, Mrs. Surowitz, could you state the extent of your schooling?

A. Yes.

176 Q. Would you explain it, please?

A. Well, I didn't have much of a training. All I had is a Jewish—I don't go—

Q. Jewish schools?

A. Jewish schools.

Q. About how many years?

A. About six or seven years, that's about all.

177 Q. Other than the income you received from some stocks that you own and your pay as a seamstress, do you have any other income?

A. Well, except that I work and except that I have some money in the bank, that's all.

Q. Has part of your income for a number of years been from dividends from the Hilton Hotels Corporation stock?

Mr. Block: I will object to that question.

Mr. Watt: Just go right ahead and answer, Mrs. Surowitz.

The Witness: What?

By Mr. Watt:

Q. Has part of your income been from dividends received on the Hilton Hotels Corporation stock?

A. That is part, yes, part of the dividends was.

Q. Did there come a time when your dividends stopped?

A. Yes.

Q. Could you indicate approximately when that was?

A. It was about sometime last year.

Q. 1963?

A. 1963 or 1962, I really don't remember what year
178 it was.

Q. On that occasion did you have a discussion with Mr. Brilliant?

A. Yes.

Q. What, if anything, was discussed then?

Mr. Block: I will object to that. That certainly is improper.

Mr. Watt: Go ahead and answer the question.

By the Witness:

A. Well, he said that he will try to see what was wrong, that I don't get my dividends.

By Mr. Watt:

Q. Now at the time, Mrs. Surowitz, that you signed the complaint which Mr. Block has asked you about, did you discuss Hilton Hotels Corporation with your son-in-law?

A. Yes.

Q. Did he explain to you what he thought was wrong with the handling of certain transactions by the corporation?

A. Yes, he explained it to me.

Q. And after that explanation to you, did you sign the complaint?

A. Yes.

179 Mr. Watt: I have no further questions.

Redirect Examination by Mr. Block.

Q. Mrs. Surowitz, when we adjourned this deposition, you went into a room with your counsel, did you not? Just a few minutes ago?

A. Well, we went into the room.

Q. And at that time isn't it correct that either Mr. Rockler or Mr. Watt told you that they would ask you the last three questions that were asked you and told you what to answer?

A. I don't know what I—we didn't say anything.

Q. Pardon me?

A. We didn't say nothing about it.

Q. You didn't say anything? How long were you in the room?

A. I didn't time myself.

Q. If I told you you were in the room about 15 minutes, would your answers still be that you didn't say anything while you were in there?

A. No.

Q. At that time isn't it correct that they told you that they would ask you these questions about your discussions with Mr. Brilliant?

180 A. I refuse to answer that.

Mr. Block: That's all. This is adjourned.

Mr. Watt: The deposition is not adjourned, sir.

Mr. Block: It is adjourned.

Mr. Watt: Miss Reporter, will you please remain? The deposition is not adjourned until all counsel have finished their examination. I don't think Mr. Block can terminate the deposition simply by walking out of the room.

Mr. Block: I am in the room.

Mr. Watt: I am glad you are, sir.

Recross Examination by Mr. Watt.

Q. Mrs. Surowitz, so that the record is perfectly clear, and there is no reason whatsoever for you to have any concern about answering fully and correctly and honestly all the questions that are put to you, we retire to an office which Mr. Block—

Mr. Block: Now wait just a minute. You are not going to testify in this case, and if you go any further with
181 this kind of a statement to this witness who is under oath and under cross-examination, we will adjourn this

and we will go over to Judge Hoffman right now, because if you don't, I will, Mr. Watt.

Mr. Watt: You mean *that*—

Mr. Block: You can make up your mind, but you are not going to make a speech to this witness. If you want to ask her a question, ask it, but don't make a speech.

Mr. Watt: I am not making a speech, Mr. Block.

Mr. Block: I don't care what you think you are doing. I know what the record shows. Now ask a question or if you go any further with this, I don't know what my brother counsel will do, but I will take this before the Federal Judge.

Mr. Friedman: We will join you.

By Mr. Watt:

Q. Mrs. Surowitz, at the time we took an adjournment some minutes ago, did we go to an office?

A. Yes.

182 Q. You and I and Mr. Rockler?

A. Yes.

Q. Did we have a brief discussion?

A. Yes.

Mr. Watt: I have no further questions.

Subscribed and sworn to before me this 25th day of February, A. D., 1964.

Notary Public.

183 United States of America,
Northern District of Illinois, }
Eastern Division, } ss:
State of Illinois, }
County of Cook. }

I, Dorothy L. Brackenbury, a notary public in and for the County of Cook and State of Illinois, do hereby certify that Dora Surowitz was by me first duly sworn to testify the whole truth and that the above deposition was recorded stenographically by me and was reduced to typewriting under my personal direction.

I further certify that the said deposition was examined and read over by the said deponent and was signed by her, and that the said deposition constitutes a true record of the testimony given by said witness.

I further certify that the exhibit attached to said deposition was offered in evidence and marked for identification as it is set forth in the said deposition.

I further certify that the deposition was taken at the time and place specified in the annexed notice, and that the taking of said deposition commenced on the 25th day of February, 1964, at 10:00 o'clock in the morning, and was completed at 11:40 of said day.

184 I further certify that Messrs. Richard F. Watt and Walter J. Rockler, 105 W. Adams Street, Chicago, Illinois, appeared as attorneys for the plaintiff; Messrs. Samuel W. Block and Keith F. Bode, 135 South LaSalle Street, Chicago, Illinois, appeared as attorneys for defendant Henry Crown; Messrs. William J. Friedman and Stanley R. Zax, 208 South LaSalle Street, Chicago, Illinois, appeared as attorneys for defendants Lawrence Stern, Willard Keith and Spearl Ellison; and Messrs. Don. H. Reuben and Lawrence Gunnels appeared as attorneys on behalf of defendant Hilton Hotels Corporation.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof, I have hereunto set my hand and affixed my seal of office, at Chicago, Illinois, this day of, 1964.

Dorothy L. Brackenbury,
*Notary Public, Cook County,
Illinois.*

185a

Surowitz Dep. Ex. No. 1.

January 22, 1963

Hilton Hotels Corp.
720 S. Michigan Avenue
Chicago 5, Illinois

Gentlemen:

As a stockholder, I protest and challenge propriety of proposed plan to redeem company's common stock and reduce its capitalization as set forth in your letters of December 17 and January 7.

I also challenge propriety of plan to purchase shares of Hilton Credit Corp. as set forth in your letter of January 7. Proposed actions serve no corporate interest and seem clearly detrimental to the welfare of the corporation and most of its stockholders.

/s/ Dora Surowitz,
1299 Ocean Avenue,
Brooklyn, New York.

186 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—63-C-2248) • •

NOTICE AND MOTION.

To: Walter J. Rockler

Richard F. Watt

105 West Adams Street

Chicago 3, Illinois

Alan J. Altheimer

Lionel G. Gross

One North LaSalle Street

Chicago 2, Illinois

Please Take Notice that on Wednesday, February 26, 1964, at the hour of 10:00 A.M., or as soon thereafter as counsel may be heard, counsel for all defendants shall appear before his Honor Judge Julius J. Hoffman in the Court Room usually occupied by him in the Federal Court House, or before such other Judge as may be sitting in his place and stead, and shall then and there move that the complaint heretofore filed herein be dismissed upon the grounds:

1. It is a sham pleading, and
2. Plaintiff, Dora Surowitz, is not a proper party plaintiff,

and shall in support of said motion tender the stenographic transcript of the deposition of Dora Surowitz taken on Tuesday, February 25, 1964, at which time and place you may appear if you so see fit. In presenting this motion on the grounds set forth above, defendants do not waive their

right to file any other motions on or before March 2, 1964, the date heretofore set for the filing of such motions by the Court.

Samuel W. Block,
Keith F. Bode,
Attorneys for Henry Crown.

187

William J. Friedman,
Stanley R. Zax,
*Attorneys for all individual
Defendants except Henry
Crown,*

A. Leslie Hodson,
Don H. Reuben,
*Attorneys for Hilton Hotels
Corporation.*

Received a copy of the above and foregoing Notice and Motion, before the hour of 4:00 P.M., this 25th day of February, 1964.

/s/ Walter J. Rockler,
/s/ Donald G. Gillies.

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UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable Julius J. Hoffman.

Cause No. 63 C 2248

Date February 26, 1964

Title of Cause

Dora Surowitz, Plaintiff v. Hilton Hotels Corporation, et al., Defendants.

Notice & Motion

Brief Statement of Motion

Motion to dismiss action.

Affidavit

Deposition of Pltff.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Samuel W. Block, Keith F. Bode—135 S. LaSalle.

William J. Friedman, Stanley R. Zax—208 S. LaSalle St.

A. Leslie Hodson, Don H. Reuben—Prudential Plaza for defendants.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Walter J. Rockler, Richard F. Watt—105 W. Adams.

Alan J. Altheimer, Lionel G. Gross—One North LaSalle for Plaintiff.

Lv. to Defts. to file deposition of Pltff. instanter. Lv. to Defts. to file affidavit of E. T. Cassin, instanter. Pltff. gv. 15 days to file documents deemed to be appropriate in opposition to Defts.' motion to dismiss action. Defts. gv. 5 days thereafter to reply. Hrg. on Defts.' motion to dismiss set for March 23, 1964 at 10 a.m. Time for Defts. to file responsive pleading to Complaint be & is extended to & including April 2, 1964.

Notices Mailed Feb. 27, 1964.

195

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—63-C-2248) * *

AFFIDAVIT.

State of New York, }
County of New York. } ss.

I, IRVING G. BRILLIANT, having been duly sworn, hereby depose and say:

1. I reside at 650 Ocean Avenue, Brooklyn, New York, and am a son-in-law of Mrs. Dora Surowitz of 1299 Ocean Avenue, Brooklyn, New York, plaintiff in the above cause.

2. I am a graduate of the College of the City of New York, where I was elected to Phi Beta Kappa, and of the Harvard Law School, and have a Master of Arts degree in economics from Columbia University. I worked for the United States Government in the capacity of an attorney for many years, but have never actively engaged in commercial legal practice. I have acted over the past ten years as an advisor to various individuals, institutions, and companies with regard to the proper investment of their funds.

196 3. In December of 1962, my immediate family, namely, my wife, Benice Brilliant, the estate of my deceased mother, Bessie Brilliant, a trust for my children Marc and Nicole Brilliant, and my mother-in-law, Mrs. Dora Surowitz, owned in excess of 2,350 shares of common stock of Hilton Hotels Corporation, representing in the aggregate an original investment of approximately \$45,000.00, and also \$10,000.00 of a 6% debenture due in 1984, and 110 stock purchase warrants of said corporation. These securities, excluding the debenture and warrants, had been purchased prior to 1960 and continued to be owned by the members of my family to and including December of 1962, and to and including this date. The debenture and warrants had been purchased at their original issue date. Some of the securities mentioned in this paragraph have been registered in the names of the respective owners, as the records of Hilton Hotels Corporation can attest; others of these securities were held in street name.

4. Beginning in or about the year 1957, my mother-in-law, Mrs. Dora Surowitz, in reliance upon my suggestions and advice, began purchasing small amounts of stock. She purchased, with her own money, 100 shares of Hilton Hotels Corporation common stock on August 1, 1957 through Bear, Stearns & Co., at a price of \$20 $\frac{1}{4}$, primarily for income; a copy of the confirmation of this purchase is attached hereto as Exhibit A. Said 100 shares of stock were held in street name forher continuously from the time of purchase to

October 1963, as the copies of brokers' statements (Ex-
197 hibits B to I inclusive attached hereto) indicate; in

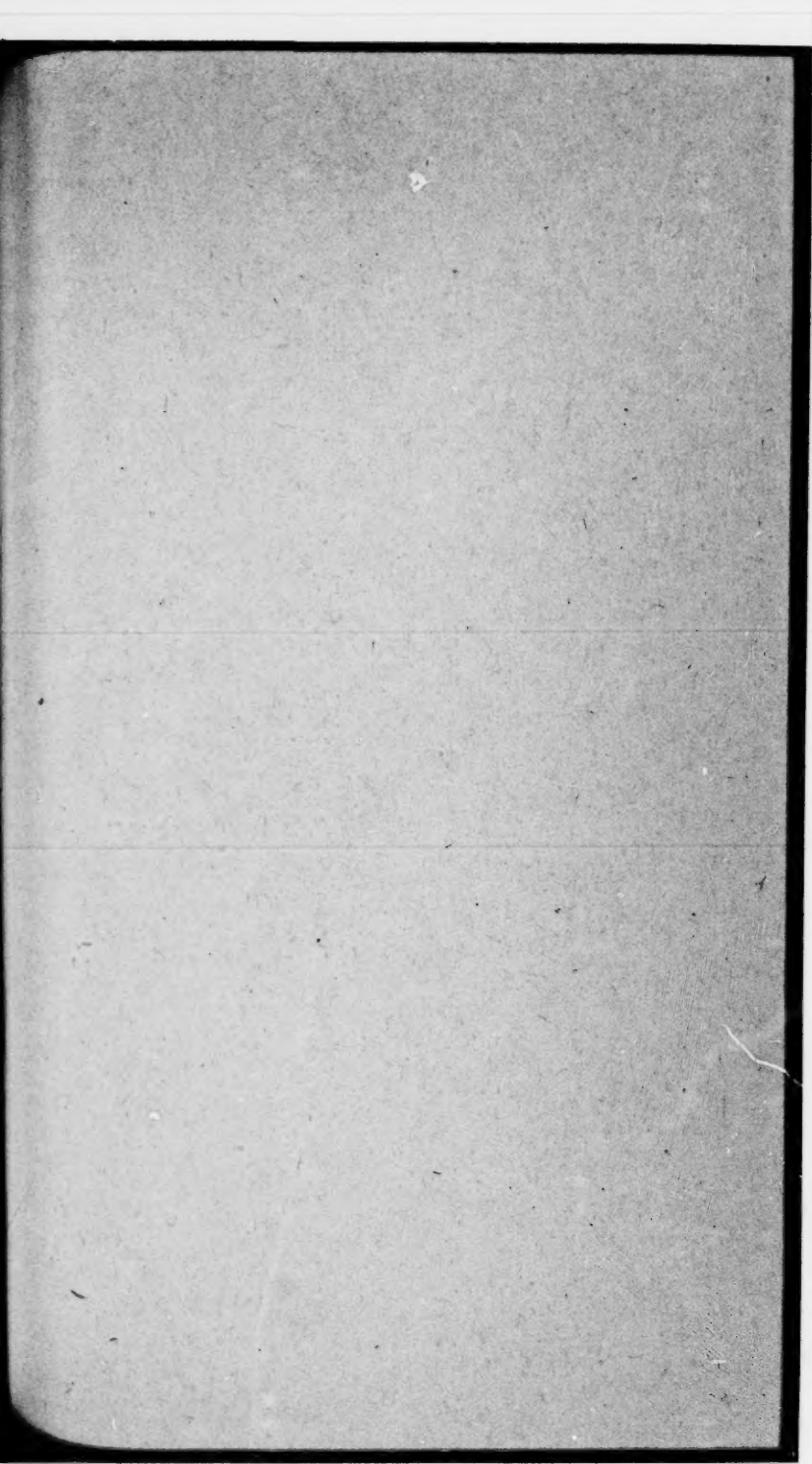
October 1963 said shares were placed in the name of Mrs. Dora Surowitz as a stockholder of record.

5. My mother-in-law, Mrs. Dora Surowitz, is a hard-working woman of limited education, who has, to my best knowledge, been working as a dressmaker since the early 1930's; she is now about 64 years of age. She is a native

of Poland. She reads very little English and has some difficulty in understanding English, except with regard to ordinary day-to-day matters. She does not have the education or experience to understand corporate and securities transactions; recognizing her limitations, she has repeatedly told me that she relies very largely on my suggestions and advice in these matters. Consequently, I was responsible for inducing her to purchase small amounts of common stocks; I believed that with her limited income and resources she could best implement her income and achieve a modest degree of security by means of such investments. From time to time, she discusses her financial affairs with me, and I give her advice and suggestions.

6. Sometime in late December 1962, Mrs. Surowitz brought to me the papers relating to the tender offer of Hilton Hotels Corporation (Exhibits A and B to the Complaint herein) and asked me what it was about. This she was wont to do with most papers received by her respecting her divers limited stock holdings. I told her I was studying the matter to decide what should be done.

198 7. I was in Chicago late in December 1962 or early in January 1963. I usually contact Walter Rockler whenever I am in Chicago, ordinarily about once a year. We have been friends since about 1947. We discussed the Hilton tender offer; Mr. Rockler and I reached the conclusion that the proposed transaction was questionable and should be objected to. One or two weeks later, following several telephone conversations between Mr. Rockler and me, Mr. Rockler drafted or had drafted a letter of complaint to the corporation protesting, on behalf of Mrs. Surowitz, the tender offers affecting Hilton Hotels Corporation and Hilton Credit Corporation. I explained the letter to Mrs. Surowitz and told her that I had reviewed the matter with an attorney in Chicago. She signed the letter, and I mailed it to the corporation.



8. Thereafter, I visited the New York Stock Exchange and studied its file on tender offers by various corporations listed on the Exchange. I also studied the volume of and prices at which Hilton Hotels Corporation common stock had been traded on the New York Stock Exchange prior to and subsequent to the tender offer. In addition, I studied the annual reports of Hilton Hotels Corporation in order to ascertain the number of shares of stock issued with respect to property acquisitions, and to determine which properties had been subsequently disposed of. I also analyzed the Corporation's acquisitions of its own stock over a period of years.

199 9. I communicated the results of the above research and analysis to Mr. Rockler, both by letter and in telephone conversations.

10. During 1963 the price of Hilton Hotels Corporation common stock declined; in the summer of 1963 the dividend was passed. These circumstances were matters of real concern to the members of my family, including Mrs. Surowitz. Again, Mrs. Surowitz asked me for my advice with respect to the Hilton stock. I told her that the attorney in Chicago with whom I had discussed the matter was of the opinion that the officers and directors had engaged in wrongful acts damaging to the corporation and its shareholders. I also told her that the attorney believed, and I agreed, that one way to prevent further mismanagement and to correct the effects of prior wrongful acts was to bring suit. Mrs. Surowitz and I discussed the matter of bringing a law suit against the corporation and its officers and directors. I told Mrs. Surowitz that there would be expenses involved in suing and that, since members of the family owned a substantial amount of Hilton stock it was reasonable to assume that the members of the family would be willing to pay a major part of the expenses.

11. Mrs. Surowitz stated that she was willing to bring

suit, and I advised Mr. Rockler of this. I considered joining as a party plaintiff in my capacity as trustee of the trust for my minor children, or as the person responsible for handling my mother's estate. I also considered—
200 and discussed the matter with my wife—the advisability of my wife joining as a plaintiff. My wife is and has been quite seriously ill for the past seven years and has spent an average of about eight weeks a year in the hospital; consequently, we concluded that she ought not be named as a party plaintiff. I also determined that I should not sue in a fiduciary capacity because of possible legal complications that might be entailed. Before reaching these conclusions, I discussed the facts and circumstances with Mr. Rockler.

12. Later Mr. Rockler sent the formal complaint to me. I read and explained it to Mrs. Surowitz. I told her that the charges in the complaint reflected the investigation and study of Mr. Rockler and myself and that, in my opinion, the charges of wrongdoing were soundly based.

IRVING G. BRILLIANT

Subscribed and sworn to before me this 9th day of March 1964.

FLORENCE A. MASON

Seal

Notary Public.

QUANTIT

2

BEAR, STEARNS & CO.

ONE WALL STREET, NEW YORK 5, N. Y.

QUANTITY OF SHARES OR PRINCIPAL AMOUNT OF BONDS
BOUGHT SOLD

100

HILTON HOTELS CORP

DESCRIPTION

PRICE

20 3/4

| MO. | DAY | YR. |
|------------|-----|-----|
| 8 | 01 | 57 |
| TRADE DATE | | |

| MO. | DAY | YR. |
|-----------------|-----|-----|
| 8 | 07 | 57 |
| SETTLEMENT DATE | | |

| AMOUNT | INTEREST STATE TAX OR ODD LOT FEE | FEDERAL TAX | REG. FEE AND/OR POST. | COMMISSION |
|--------|---|----------------|--------------------------|------------|
| 207500 | | | | 2538 |

| TOTAL AMOUNT |
|--------------|
| 210038 |

| OFF. | ACCOUNT | T | C. M. |
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| 6 | 51672 | 42 | |

| \$ | † | ◇ |
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| | 11 | |

SEE REVERSE SIDE FOR EXPLANATION OF SYMBOLS T † ◇

MRS DORA SURAWITZ
1299 OCEAN AVE
BROOKLYN 30 NY

EXHIBIT A

THE TERMS, CONDITIONS AND AGREEMENT CONTROLLING THIS TRANSACTION ARE PRINTED ON THE REVERSE SIDE OF THIS CONFIRMATION. PLEASE READ THEM CAREFULLY.

MRS DORA SURAWITZ
1299 OCEAN AVE
BROOKLYN 30 NY

PERIOD ENDING
12/31/58
MO. DAY YR.

YOUR ACCOUNT NO. 7
6 51672

IN ACCOUNT WITH

SHEET

BEAR, STEARNS & Co.

1

NEW YORK 5, N. Y.

CASH,
MARGIN
SHORT
SPEC. MISC.
SPECIAL SUBS'N
WHEN ISSUED CASH
WHEN ISSUED MARGIN
WHEN ISSUED SPEC. MISC.
SPECIALIST

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9.
IF THIS IS A GENERAL ACCOUNT AND WE MAINTAIN A SPECIAL MISCELLANEOUS ACCOUNT FOR YOU UNDER SECTION 4 (P) (4) OF REGULATION T ISSUED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THIS IS A COMBINED STATEMENT OF YOUR GENERAL ACCOUNT AND SPECIAL MISCELLANEOUS ACCOUNT. THE PERMANENT RECORD OF THE SPECIAL MISCELLANEOUS ACCOUNT AS REQUIRED BY REGULATION T IS AVAILABLE FOR YOUR INSPECTION AT YOUR REQUEST.

IF THIS STATEMENT IS NOT IN ACCORDANCE WITH YOUR RECORDS PLEASE NOTIFY US IMMEDIATELY.

| DATE | SECURITIES | | DESCRIPTION | PRICE | AMOUNT | | | | BALANCE | |
|----------|--------------------|-------------------|---------------------------------------|-------|--------|--|--------|--|---------------------|----|
| | BOUGHT OR RECEIVED | SOLD OR DELIVERED | | | DEBIT | | CREDIT | | DEBIT UNLESS MARKED | CR |
| 12/31/58 | DIV ON | 100 | BALANCE FORWARD HILTON HOTELS CORP | DIV | | | 30.00 | | 203238CR | |
| | 100 | | CHARTER OIL LTD | BAL | | | | | 206238CR | |
| | 100 | | HILTON HOTELS CORP | BAL | | | | | | |
| | 2 | | KAYSER ROTH CORP | BAL | | | | | | |
| | 200 | | KILEMBE COPPR COBALT | BAL | | | | | | |

EXHIBIT B

MRS DORA SURAWITZ
1299 OCEAN AVE
BROOKLYN 30 NY

PERIOD ENDING
12/31/59
MO. DAY YR.

YOUR ACCOUNT NO. T
6 51672

IN ACCOUNT WITH

SHEET

BEAR, STEARNS & CO. 1

NEW YORK 5, N. Y.

CASH.
MARGIN
SHORT
SPEC. MISC.
SPECIAL SUBSC'H
WHEN ISSUED CASH
WHEN ISSUED MARGIN
WHEN ISSUED SPEC. MISC.
SPECIALIST

1.
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3.
4. IF THIS IS A GENERAL ACCOUNT AND WE MAINTAIN A SPECIAL MISCELLANEOUS ACCOUNT FOR YOU UNDER SECTION 4 (F) (6) OF REGULATION T ISSUED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THIS IS A COMBINED STATEMENT OF YOUR GENERAL ACCOUNT AND SPECIAL MISCELLANEOUS ACCOUNT. THE PERMANENT RECORD OF THE SPECIAL MISCELLANEOUS ACCOUNT AS REQUIRED BY REGULATION T IS AVAILABLE FOR YOUR INSPECTION AT YOUR REQUEST.
5.
6.
7.
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9.

IF THIS STATEMENT IS NOT IN ACCORDANCE WITH YOUR RECORDS PLEASE NOTIFY US IMMEDIATELY.

| DATE | SECURITIES | | DESCRIPTION | PRICE | AMOUNT | | BALANCE | |
|--------|--------------------|-------------------|--------------------|-------|--------|--------|---------------------|-------|
| | BOUGHT OR RECEIVED | SOLD OR DELIVERED | | | DEBIT | CREDIT | DEBIT UNLESS MARKED | CR |
| NEW 27 | | | BALANCE FORWARD | | | | 1008 | 72 CR |
| DEC 1 | DIV ON | 100 | HILTON HOTELS CORP | DIV | | 30 00 | | |
| DEC 8 | | 53 | HILTON CREDIT CORP | DEL | | | | |
| DEC 15 | 200 | | DEVON PALMER OILS | | 181 92 | | | |
| DEC 15 | | | CDN FUNDS 85CTS | | | | | |
| DEC 15 | | | UNSOLICITED | | | | | |
| DEC 24 | DIV ON | 30 | THE MARTIN CO | DIV | | 12 00 | 868 | 80 CR |
| | 100 | | CHARTER OIL LTD | BAL | | | | |
| | 500 | | DEVON PALMER OILS | BAL | | | | |
| | 100 | | HILTON HOTELS CORP | BAL | | | | |
| | 2 | | KAYSER ROTH CORP | BAL | | | | |
| | 30 | | THE MARTIN CO | BAL | | | | |

EXHIBIT C

MRS DORA SURAWITZ
1299 OCEAN AVE
BROOKLYN 30 NY

PERIOD ENDING
12/30/60
MO. DAY YR.

YOUR ACCOUNT NO. 7
6 51672

IN ACCOUNT WITH

SHEET

BEAR, STEARNS & Co. 1
New York 3, N. Y.

CASH,
MARGIN
SHORT
SPEC. MISC.
SPECIAL SUBSC'N
WHEN ISSUED CASH
WHEN ISSUED MARGIN
WHEN ISSUED SPEC. MISC.
SPECIALIST

- 1.
- 2.
- 3.
4. IF THIS IS A GENERAL ACCOUNT AND WE MAINTAIN A SPECIAL MISCELLANEOUS ACCOUNT FOR YOU UNDER SECTION 4 (F) (3) OF REGULATION T ISSUED BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THIS IS A COMBINED STATEMENT OF YOUR GENERAL ACCOUNT AND SPECIAL MISCELLANEOUS ACCOUNT, THE PERMANENT RECORD OF THE SPECIAL MISCELLANEOUS ACCOUNT AS REQUIRED BY REGULATION T IS AVAILABLE FOR YOUR INSPECTION AT YOUR REQUEST.
- 5.
- 6.
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- 9.

IF THIS STATEMENT IS NOT IN ACCORDANCE WITH YOUR RECORDS PLEASE NOTIFY US IMMEDIATELY.

| DATE | SECURITIES | | DESCRIPTION | PRICE | AMOUNT | | BALANCE | |
|--------|--------------------|-------------------|--------------------|-------|--------|--------|---------------------|-----------|
| | BOUGHT OR RECEIVED | SOLD OR DELIVERED | | | DEBIT | CREDIT | DEBIT UNLESS MARKED | CR |
| DEC 01 | DIV ON | 100 | HILTON HOTELS CORP | DIV | | | | |
| DEC 21 | DIV ON | 31 | THE MARTIN CO | DIV | | 37.50 | | |
| | | | | | | 15.50 | | |
| | 100 | | HILTON HOTELS CORP | BAL | | | | |
| | 31 | | THE MARTIN CO | BAL | | | | |
| | | | | | | | | 530.00 CR |

EXHIBIT D

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES AND INCLUDE ANY DIVIDENDS IN YOUR INCOME TAX RETURN FOR THE CURRENT YEAR.
A FINANCIAL STATEMENT OF THIS FIRM IS AVAILABLE FOR YOUR PERSONAL INSPECTION AT ITS OFFICES, OR A COPY WILL BE MAILED UPON WRITTEN REQUEST.

E. & O. E.

ORIGINAL
EMANUEL, DEETJEN & Co.
 ESTABLISHED 1929

NEW YORK STOCK EXCHANGE
 MIDWEST STOCK EXCHANGE

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AMERICAN STOCK EXCHANGE
 COMMODITY EXCHANGE, INC.

EMANUEL, DEETJEN & CO., LTD.
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130 BROADWAY, NEW YORK 5, N. Y., Display 9-4077
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MRS DORA SUROWITZ
 1299 OCEAN AVE
 BROOKLYN NY

PERIOD ENDING
 MO. DAY YR.
 99 12 66

OFF. ACCT. NO. T
 1906852

GENERAL 0.
 CASH 1.
 MARGIN 2.
 SHORT 3.
 SPEC. MISC. 4.
 PUT & CALL 5.
 SUBSCRIPTION 6.
 SPECIAL LOAN 7.

IF THIS STATEMENT IS NOT IN ACCORDANCE WITH YOUR RECORDS PLEASE NOTIFY US IMMEDIATELY.

| SECURITIES | | DESCRIPTION | PRICE | AMOUNT | | BALANCE DEBIT UNLESS MARKED CR. |
|-----------------------|----------------------|--------------------|--------|--------|--------|------------------------------------|
| BOUGHT OR RECEIVED | SOLD OR DELIVERED | | | DEBIT | CREDIT | |
| 50 | | MARTIN MARIETTA | 27 1/8 | 137481 | | 137481 |
| 100 | | HILTON HOTELS CORP | BAL | | | |
| 50 | | MARTIN MARIETTA | BAL | | | |
| 50 | | OLIN MATHIESON | BAL | | | |
| EXHIBIT E | | | | | | |

REGULAR TRANSACTIONS, IF ANY, WHICH ARE TO BE CLEARED SUBSEQUENT TO THE END OF THE MONTH, ARE NOT INCLUDED. THEY WILL APPEAR IN YOUR ACCOUNT OF THE FOLLOWING MONTH.
 PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES AND INCLUDE ANY DIVIDENDS IN YOUR INCOME TAX RETURN FOR THE CURRENT YEAR.
 A FINANCIAL STATEMENT OF THIS FIRM IS AVAILABLE FOR YOUR PERSONAL INSPECTION AT ITS OFFICES, OR A COPY WILL BE MAILED UPON WRITTEN REQUEST.
 NO AGENT OR EMPLOYEE OF OUR FIRM HAS ANY AUTHORITY TO MAKE ANY REPRESENTATION OR STATEMENT WITH RESPECT TO ANY SECURITY.
 If this is a general account and we maintain a special miscellaneous account for you under section 4 (F) (6) of regulation T issued by the Board of Governors of the Federal Reserve System, this is a combined statement of your general account and special miscellaneous account. The permanent record of the special miscellaneous account as required by regulation T is available for your inspection at your request.

THE LAST AMOUNT IN THIS COLUMN
 IS YOUR BALANCE

MRS DORA SUROWITZ
1299 OCEAN AVE
BROOKLYN NY

PERIOD ENDING
MO DAY YR
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OFF. ACCT. NO. T
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GENERAL 0.
CASH 1.
MARGIN 2.
SHORT 3.
SPEC. MISC. 4.
PUT & CALL 5.
SUBSCRIPTION 6.
SPECIAL LOAN 7.

ORIGINAL
EMANUEL, DEETJEN & Co.

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| DATE | SECURITIES | | DESCRIPTION | PRICE | AMOUNT | | BALANCE DEBIT UNLESS MARKED CR. |
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| 8 | 100 | | BAL JULY 27TH 1962 | | | | 152551 |
| 8 | | | BRIT AMER CONST MAT | JRL | | | |
| 9 | | | TFR OF FUNDS | JRL | | 3825 | |
| 9 | 100 | | BRIT AMER CONST MAT | DEL | | | |
| 9 | 100 | | HILTON HOTELS CORP | DEL | | | |
| 9 | 50 | | MARTIN MARIETTA | DEL | | | |
| 9 | 50 | | OLIN MATHIESON | DEL | | | |
| 9 | 100 | | SHELL TRANS&T NY SHR | DEL | | | |
| 7 | | | DEL AGAINST PAYMENT | | | 149500 | |
| 1 | | | INT TO AUG 15 | | 516 | | |
| | | | CHECK PAID | CHK | 258 | | |
| EXHIBIT F | | | | | | | |
| CR | | | | | | | |

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THE LAST AMOUNT IN THIS COLUMN
IS YOUR BALANCE

IN ACCOUNT WITH

Oppenheimer & Co.
MEMBERS OF THE NEW YORK STOCK EXCHANGE

5 HANOVER SQUARE • NEW YORK 4, N. Y.

MRS DORA SUROWITZ
1299 OCEAN AVE
BROOKLYN N Y

PERIOD ENDING

08/31/62

ACCOUNT NO.

69016

R.R.

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YOU MAY HAVE RECEIVED CONFIRMATION FOR TRADES WHICH DO NOT APPEAR ON YOUR STATEMENT. HOWEVER, IF THE SETTLEMENT DATE OF TRADE AS SHOWN ON THE CONFIRMATION WAS LATER THAN THE DATE THAT APPEARS AT THE TOP OF YOUR STATEMENT, THE TRADE WILL APPEAR ON YOUR NEXT REGULAR MONTHLY STATEMENT.

PLEASE ADDRESS ALL COMMUNICATIONS TO THE FIRM AND NOT TO INDIVIDUALS AND KINDLY MENTION YOUR ACCOUNT NUMBER.

| DATE MO. DAY | BOUGHT RECEIVED OR LONG | SOLD DELIVERED OR SHORT | DESCRIPTION | PRICE OR ENTRY | AMOUNT CHARGED | AMOUNT CREDITED | BALANCE (DEBIT UNLESS MARKED CR) | CR | ACCT. TYPE-C |
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| 0809 | 100 | | BRIT AMER CONST LTD | REC | 149500 | | | | 2-3 |
| 0809 | 100 | | HILTON HOTELS CORP | REC | | | | | 2-3 |
| 0809 | 50 | | MARTIN MARIETTA CORP | REC | | | | | 2-3 |
| 0809 | 50 | | OLIN MATHIESON CHEM | REC | | | | | 2-3 |
| 0809 | 100 | | SHELL TRANS TRAD ORD | REC | | | | | 2-3 |
| 0820 | | | INTEREST TO AUG20 | INT | 228 | | | | 2-3 |
| | | | BALANCE ENDING AUG31 | | | | 149728 | | 2-3 |
| | 100 | | BRIT AMER CONST LTD | POS | | | | | 2-3 |
| | 100 | | HILTON HOTELS CORP | POS | | | | | 2-3 |
| | 50 | | MARTIN MARIETTA CORP | POS | | | | | 2-3 |
| | 50 | | OLIN MATHIESON CHEM | POS | | | | | 2-3 |
| | 100 | | SHELL TRAN&TR N Y SH | POS | | | | | 2-3 |
| END OF STATEMENT | | | | | | | | | |
| EXHIBIT G | | | | | | | | | |

PLEASE PRESERVE THIS STATEMENT FOR YOUR INCOME TAX RECORD.

E. & O.E. WE MUST BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS.

IN ACCOUNT WITH

Oppenheimer & Co.
MEMBERS OF THE NEW YORK STOCK EXCHANGE

5 HANOVER SQUARE • NEW YORK 4, N. Y.

PERIOD ENDING

ACCOUNT NO.

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MRS DORA SURGUTZ
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BROOKLYN N Y

YOU MAY HAVE RECEIVED CONFIRMATION FOR TRADES WHICH DO NOT APPEAR ON YOUR STATEMENT. HOWEVER, IF THE SETTLEMENT DATE OF TRADE AS SHOWN ON THE CONFIRMATION WAS LATER THAN THE DATE THAT APPEARS AT THE TOP OF YOUR STATEMENT, THE TRADE WILL APPEAR ON YOUR NEXT REGULAR MONTHLY STATEMENT.

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| | | | MARGIN ACCOUNT | | | | | | |
| 1204 | | | BALANCE FORWARD NOV 30 | | | | 151599 | | 2-3 |
| | | | 100 BR AM CONST LTD | DIV | | 1026 | | | 2-3 |
| | | | 2.12 L 15% NRT | | | | | | |
| 1204 | | | 100 HIL HOT 2.37 1/2 | DIV | | 3750 | | | 2-3 |
| 1207 | | | 50 C PATHIESON CHEM | DIV | | 1250 | | | 2-3 |
| | | | .25 | | | | | | |
| 1211 | | | CHECK PAID | CHK | 1250 | | | | 2-3 |
| | | | 2.50 | | | | | | |
| 1211 | | | CHECK PAID | CHK | 4770 | | | | 2-3 |
| | | | 2.50 | | | | | | |
| 1219 | | | 100 SHEL TR & TR NY | DIV | | 3270 | | | 2-3 |
| | | | 2.326997 | | | | | | |
| 1227 | | | 50 MARTIN MARIETTA | DIV | | 1250 | | | 2-3 |
| | | | .25 | | | | | | |
| 1227 | | | CHECK PAID | CHK | 3270 | | | | 2-3 |
| | | | .25 | | | | | | |
| 1231 | | | CHECK PAID | CHK | 1250 | | | | 2-3 |
| | | | 2.17 1/2 | | | | | | |
| 1231 | | | INTEREST TO DATE AT 5 % | INT | 643 | | | | 2-3 |
| | | | CLOSING BALANCE DEC 31 62 | | | | 152242 | | |
| | 100 | | BRITISH AMER CONST LTD | POS | | | | | 2-3 |
| | 100 | | HILTON HOTELS CORP | POS | | | | | 2-3 |
| | 50 | | MARTIN MARIETTA CORP | POS | | | | | 2-3 |
| | 50 | | OLIN PATHIESON CHEM | POS | | | | | 2-3 |

EXHIBIT H

PLEASE PRESERVE THIS STATEMENT FOR YOUR INCOME TAX RECORD.

E. & O. E. WE MUST BE IMMEDIATELY OF ANY ERRORS OR OMISSIONS.

IN ACCOUNT WITH **Oppenheimer & Co.** 5 HANOVER SQUARE • NEW YORK 4, N. Y.
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08-09-4071

MRS DORA SURCHITZ
1299 OCEAN AVE
BROOKLYN N Y

PERIOD ENDING
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| | | | MARGIN ACCOUNT | | | | |
| 00263 | | | BALANCE FORWARD SEP 29 | | 327534 | | 2-3 |
| | | | AMERICAN SUGAR COMPANY | DIV | | 2250 | 2-3 |
| | | | 100 SHS @00.2250 | | | | |
| 00763 | | | DIV | CHK | 2250 | | 2-3 |
| 01063 | 100 | | AMERICAN SUGAR COMPANY | DEL | | 329000 | 2-3 |
| 01063 | 50 | | MARTIN MARIETTA CORP | DEL | | | 2-3 |
| 01063 | 50 | | GLIN PATHIESON CHEN | DEL | | | 2-3 |
| 01063 | 100 | | SHELL TRANSIT N Y SH | DEL | | | 2-3 |
| 01563 | 100 | | HILTON HOTELS CORP | DEL | | | 2-3 |
| 02563 | | | INTEREST TO DATE AT 5 % | INT | 499 | | 2-3 |
| | | | CLOSING BALANCE OCT 25 63 | | | 967 | |
| | | | E-N-D O-F S-T-A-T-E-M-E-N-T | | | | |
| | | | EXHIBIT I | | | | |

210

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—63-C-2248) • •

AFFIDAVIT.

WALTER J. ROCKLER, being first duly sworn on oath, deposes and says the following:

1. He is an attorney at law admitted to practice in the States of Illinois and New York and the District of Columbia, the United States District Court for the Northern District of Illinois, the Court of Appeals for the Seventh Circuit, and the United States Supreme Court. He is one of counsel for the plaintiff in the above-entitled case.

2. As counsel for the plaintiff, affiant and his colleagues made an extensive and systematic investigation of the facts and law set forth in the Complaint in this action; the character, scope and circumstances of that investigation are more fully described below. In the period from December 1962 to the date of filing the Complaint, affiant and his colleagues spent in excess of 150 hours on this matter. Moreover, their efforts were substantially supplemented by the researches and investigations of Mr. Irving Brilliant, as more fully described below.

3. Affiant has known Mr. Irving Brilliant for approximately sixteen years. This acquaintance began when Mr. Brilliant and he were members of the legal staff of the Office of Chief Counsel for War Crimes, Nurnberg, Germany, engaged in the prosecution of the Nurnberg War Crimes Trials during 1947-1949. Thereafter he maintained friendly relations with Mr. Brilliant; from time to time, he has been Mr. Brilliant's house guest in New York City and Mr. Brilliant has been his house guest in Chicago and Winnetka, Illinois.

4. At the end of December 1962 or the beginning of

January 1963, when Mr. Brilliant was visiting in Chicago, Mr. Brilliant consulted affiant in the latter's professional capacity concerning Hilton Hotels Corporation.

5. Mr. Brilliant explained that he had for some time been acting as advisor and representative in investment matters for sveral members of his and his wife's families. The family members whom he represented, including himself as trustee for certain family members, owned well in excess of 2,000 shares of Hilton Hotels Corporation.

212 6. In the latter part of December 1962, Mr. Brilliant and other stockholders of Hilton Hotels Corporation whom he represented had received certain documents (Exhibits A and B of the Complaint in this action) from the corporation setting forth an offer to purchase shares of common stock of the corporation upon tender by shareholders. Mr. Brilliant believed that the terms of the offer stated in these documents were very unusual and that the representations made therein were dubious. Upon reviewing and discussing the documents, affiant was also of the tentative opinion that the proposed transaction was legally questionable and should be protested.

7. Shortly thereafter, when Mr. Brilliant had returned to New York City, there was a correspondence between affiant and Mr. Brilliant and telephone calls were exchanged between them. Affiant examined the amendment (Exhibits C and D to the Complaint in this action) made on January 7, 1963 to the original offer by Hilton Hotels Corporation, and other materials and information which he was able to obtain.

8. Mr. Brilliant transmitted information concerning a proposed offer by Hilton Hotels Corporation to purchase, on tender by shareholders, the common stock of a related corporation, Hilton Credit Corporation. Mr. Brilliant requested that affiant state his views also as to the legal propriety of this proposed transaction. After examining

the documents and other information, affiant reached
213 the conclusion that the proposed tender offer with respect to Hilton Credit Corporation stock was probably wrongful from a legal standpoint.

9. Later in January, 1963, stating that he was acting on behalf of his mother-in-law (Mrs. Dora Surowitz), Mr. Brilliant by telephone asked affiant to draft an appropriate letter of protest on the proposed transactions which Mrs. Surowitz might sign and transmit to the corporation. Affiant prepared such a draft letter.

10. Affiant was subsequently informed that Mrs. Surowitz had sent a letter of protest to the corporation. He was also furnished by Mr. Brilliant with a copy of the reply of the corporation prepared by its counsel, Mr. William J. Friedman, on January 25, 1963.

11. In the months following the consummation of the tender transactions by Hilton Hotels Corporation, Mr. Brilliant requested that affiant continue to investigate these matters and any other transactions involving Hilton Hotels Corporation and Hilton Credit Corporation which might come to his attention. In particular, he wished to ascertain who had tendered stock, at what times, at what prices, and under what circumstances.

12. During the same period, at the request of affiant Mr. Brilliant furnished information obtained from the records of the New York Stock Exchange, from the reports and releases of Hilton Hotels Corporation to stockholders
214 of that corporation, from the New York bank representing the corporation, from financial journals, and from Securities and Exchange Commission releases. Mr. Brilliant also prepared for affiant's use tables and charts concerning transactions of Hilton Hotels Corporation officers, directors and insiders during periods surrounding the tender offer, as well as studies of transactions in its own stock conducted by that corporation for several years prior

to the tender transactions, and volume and price studies of trading generally in the stock of Hilton Hotels Corporation.

13. During this period, affiant and other attorneys associated with him investigated not only the tender transactions of these corporations but also other financial transactions and affairs occurring in recent periods. For example, he secured information with respect to another lawsuit pending against Hilton Hotels Corporation in California and obtained copies of the court records in that matter. He examined other major tender transactions with which he was acquainted or of which he became aware, with a view to the kind of materials and information furnished stockholders authorized to participate in such actions. He reviewed the movement of prices of the stock of Hilton Hotels Corporation and Hilton Credit Corporation. He sought out information on the corporations appearing in financial journals and manuals.

14. During April 1963, at the request of Mr. Brilliant, affiant arranged for the attendance of a colleague at the 215 annual meeting in Chicago of stockholders of Hilton Hotels Corporation. The principal item for consideration before that stockholders' meeting was an amendment to the certificate of incorporation of Hilton Hotels Corporation which would authorize interested directors to vote on self-dealing transactions. When Mr. Brilliant's representative, holding a proxy of I. G. Brilliant, Trustee, sought to vote in opposition to the management proposal in favor of permitting interested persons so to act, the presiding corporate officials refused to honor the proxy.

15. In September 1963, while in Washington D. C. on other business, affiant spent considerable time at the offices of the Securities and Exchange Commission reviewing the public files with respect to Hilton Hotels Corporation and Hilton Credit Corporation. At that time he reviewed all of

the available Form 4 (Ownership Report) files with respect to officers, directors and insiders of Hilton Hotels Corporation. He also secured copies of several Form 4 Reports. He examined the so-called "10-K" (Annual Report) files for Hilton Hotels Corporation and Hilton Credit Corporation. He also examined the "8-K" reports of each corporation and reviewed the registration statements filed by Hilton Hotels Corporation during the three preceding years. He further examined the prospectuses issued by Hilton Hotels Corporation in 1959 and 1961.

16. He discovered that the SEC files reflected several instances of inaccuracies in reporting, inadequacy of 216 disclosure, and omissions and late filings with respect to data and information required by Federal securities laws and regulations. For example, Mr. Conrad Hilton's Form 4 Reports for the latter part of 1962 and January 1963 had to be amended at least twice. Also by way of example, in an "8-K" report filed by Hilton Hotels Corporation in October 1962 for September 1962, it was noted that the corporation had failed in its previous reporting for the year 1961 to disclose a major transaction involving a complicated exchange of land for preferred stock or bonds, or both, of a stated value of approximately \$5,000,000. Furthermore, in the course of his examination and review of the documents filed by Hilton Hotels Corporation and Hilton Credit Corporation, affiant found that transactions involving officers, directors and insiders were frequently reported in an obscure manner, so that the parties and the elements of the transactions were not readily identifiable.

17. During the months following January 1963, affiant personally and with the assistance of other attorneys at his offices also investigated questions of law suggested by the facts and information gained concerning transactions of Hilton Hotels Corporation and Hilton Credit Corpora-

tion. An examination of the Federal securities laws and regulations was undertaken, as well as an examination of statutes and cases relating to directors' and officers' duties to corporations and stockholders in self-dealing transactions and situations.

18. During the period from January 1963 through 217 September 1963 a periodic interchange of information occurred between Mr. Brilliant and affiant by way of letters and telephone calls. Affiant communicated a growing belief and conviction that officers and directors of Hilton Hotels Corporation had engaged in wrongful transactions in connection with the tender offers.

19. In August 1963, Hilton Hotels Corporation announced that it would not pay its usual dividend, declaring that adverse business conditions had made this necessary. During 1963 the market value of the stock of the corporation declined steadily. Mr. Brilliant repeatedly stated to affiant the view that stockholders whom he represented were dissatisfied with the state of Hilton Hotels Corporation affairs. In particular, he had discussed the matter with his mother-in-law, Mrs. Surowitz, and had communicated generally to her the conclusions which he and affiant had reached with respect to the tender transactions. He advised affiant that she wished to bring an action against the corporation and any persons whose transactions involving the corporation were legally improper. Affiant stated that, based upon his research into the facts and law, it appeared that Mr. Conrad Hilton was in violation of Section 16(b) of the Securities Exchange Act of 1934 and that several of the officers and directors of the corporation had violated numerous provisions of the Federal Securities Acts of 1933 and 1934. Mr. Brilliant directed affiant to prepare a complaint or complaints on behalf of Mrs. Surowitz 218 against these entities and any persons whose acts appeared to be wrongful.

20. Accordingly, with the assistance of other members of his firm, affiant prepared a complaint on behalf of Mrs. Surowitz against Hilton Hotels Corporation and Mr. Conrad N. Hilton individually, charging violation of Section 16(b) of the 1934 Securities Act. After this complaint had been transmitted to and read and reviewed by Mr. Brilliant and Mrs. Surowitz, affiant filed the complaint in the United States District Court for the Northern District of Illinois, Eastern Division, on or about September 23, 1963. This action bears case number 63 C 1783, and is pending before Judge Austin.

21. Thereafter, at the end of October, 1963, affiant and Mr. Richard Watt were invited to discuss the aforementioned suit, 63 C 1783, with Mr. Stanley Zax, counsel for the defendants therein. Mr. Zax informed affiant and Mr. Watt that Mr. Conrad N. Hilton had purchased 101,500 shares of common stock of Hilton Hotels Corporation for an aggregate price in excess of \$3,250,000.00 from several trusts established for the benefit of members of the family of Mr. Henry Crown. For example, a substantial number of shares were purchased from Mr. Harry Wyatt, acting as a trustee, and a substantial number of shares were purchased from Mr. Lester Crown, acting as a trustee. These purchases, made at or about the time that Mr. Hilton tendered 85,000 shares of stock to the Hilton Hotels Corporation at \$28 $\frac{1}{4}$ per share, were made at various prices 219 ranging from \$30 to \$35 per share from trustees and others. When affiant and Mr. Watt inquired why Mr. Conrad Hilton would pay to these Crown interests an average of about \$4 per share above both the alleged market price and his own tender price, they were informed that Mr. Hilton wanted the tender offer to be a success and that the discrepancy in prices reflected Mr. Hilton's philanthropic nature. Mr. Zax further indicated that during the period of the tender offer the officers and directors of Hil-

ton Hotels Corporation were kept informed from time to time as to the amount of stock being offered and the prices at which the stock was being offered.

22. Mr. Zax' communications were consistent with and reinforced conclusions reached from the investigations and researches of affiant and his colleagues and Mr. Brilliant. At the same time, they furnished factual information and details not available in the files of the Securities and Exchange Commission or from other sources.

23. Prior to the conversation with Mr. Zax and at the time that the complaint with respect to Section 16(b) was being prepared, a draft complaint charging multiple violations of the Federal Securities Acts and Regulations and corporate and common law was also being prepared by affiant's colleagues. After the conference with Mr. Zax, this draft complaint was carefully reviewed and prepared in final form, adding thereto the information gained from this and other sources. A verification was prepared in connection with this complaint which set forth that certain allegations were true and correct. Affiant then called Mr. Brilliant to state that he was mailing the complaint and that he wanted the complaint and verification reviewed carefully with Mrs. Surowitz. To the knowledge of affiant, the allegations specified in the verification to be true and correct were and are true and correct.

24. Within a few days after the complaint had been mailed to Mr. Brilliant and Mrs. Surowitz, it was returned to affiant, with verification executed. Counsel for the plaintiff signed the complaint and filed it with the United States District Court for the Northern District of Illinois, Eastern Division, on December 13, 1963.

25. Affiant states that as a result of his investigations he believes the complaint in this action to be firmly grounded in fact and law. He fully expects that a trial of this matter

will establish the merits of the plaintiff's position on behalf of herself and all other stockholders and the substantial truth and soundness of the allegations of fact set forth in the complaint.

26. This affidavit is made necessary by defendants' motion of February 26, 1964 and the proceedings in Court on that date; it is filed solely for the purpose of refuting incorrect and misleading implications therein. Counsel 221 and the plaintiff do not in any respect agree to waive, and expressly reserve, the attorney-client privilege and the confidential and privileged character of counsel's work products.

/s/ Walter J. Rockler.

Subscribed and Sworn to before me this 12 day of March, 1964.

/s/ Helen Hart Jones,
Notary Public.

(Seal)

MOTION TO STRIKE.

Now come the individual defendants in the above entitled action, through their respective attorneys, and move this Court for the entry of an order striking the affidavits of Walter J. Roekler and Irving G. Brilliant, filed March 12, 1964, on the ground that said affidavits fail to state any legally sufficient defense or answer to defendants' motion to strike the complaint, and on the further ground that said affidavits are in direct conflict with the sworn testimony of plaintiff, Mrs. Dora Surowitz.

/s/ Keith F. Bode,

Samuel W. Block,

Keith F. Bode,

Attorneys for Henry Crown,

William J. Friedman,

Stanley R. Zax,

*Attorneys for all individual
Defendants except Henry
Crown.*

135 So. LaSalle St.,
Chicago 3, Illinois,
RAndolph 6-0220.

234

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—63-C-2248) • •

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF DISMISSAL.**

This case coming on to be heard on the motion of defendants to dismiss the complaint on the ground that it is a sham and frivolous pleading and on the ground that it contains a false verification, the defendants having filed and submitted in support of said motion the transcript of the deposition of the plaintiff, Mrs. Dora Surowitz, taken on February 25, 1964, plaintiff having submitted in opposition to said motion the affidavits of Walter J. Rockler and Irving G. Brilliant, and the Court having heard the arguments of counsel on said motion on February 26, 1964 and March 23, 1964, and being fully advised in the premises, hereby makes the following:

Findings of Fact.

1. This is a shareholders' derivative action in which the jurisdiction of the Court is invoked on the grounds of diversity of citizenship and of alleged violations of the Securities Act of 1933 and of the Securities Exchange Act of 1934 in connection with the purchase by Hilton Hotels Corporation of certain of its shares of common stock in January, 1963, and the purchase by Hilton Hotels Corporation of certain shares of common stock of Hilton Credit Corporation in February, 1963.
2. The complaint consists of 11 separate counts. It is 92 pages in length and contains an additional 13 pages of exhibits.
3. The complaint makes a number of extremely serious charges against all the directors and certain officers of

Hilton Hotels Corporation. The complaint charges that these men used their corporate positions to make personal profits at the expense of the corporation and other shareholders and that they breached their fiduciary obligations and engaged in schemes and deceptive devices, including the mailing of false and misleading information to shareholders of the corporation. Specifically, the complaint charges that these individual defendants caused Hilton Hotels Corporation to purchase shares of stock of that corporation and of Hilton Credit Corporation, owned by some of the individual defendants, at prices above the fair market prices for such stock. With respect to the purchase of Hilton Hotels Corporation common stock, the complaint further charges that the individual defendants knew that the market price of Hilton Hotels Corporation stock would decline in the near future.

4. Purportedly pursuant to the requirements of Rule 23(b) of the Federal Rules of Civil Procedure, the complaint was verified by the plaintiff, Mrs. Dora Surowitz. The jurat sworn to by Mrs. Surowitz stated, inter alia, that she was familiar with the matters alleged in the complaint; that she knew that the matters alleged in paragraph 1 of each count, paragraphs 6 and 7 of Counts I, II, III, IV and V, the last sentence of paragraph 13 of Counts I, II and VI, the last sentence of paragraph 10 of Counts III and IV, paragraph 5 of Count VI, the last sentence of paragraph 14 of Counts VII, VIII and XI, and the last sentence of paragraph 12 of Counts IX and X were all true and correct; and that she made all of the other allegations of the complaint on information and belief and believed them to be true. Mrs. Surowitz executed this jurat under oath on December 12, 1963.

5. On January 6, 1964, defendants served upon plaintiff's counsel a notice of the taking of the deposition of the plaintiff on February 25, 1964. Plaintiff's counsel

sought to postpone the taking of this deposition until such time as defendants had filed a responsive pleading. This Court denied plaintiff's motion and the deposition of Mrs. Surowitz was taken on the date stated in the notice.

6. The transcript of the deposition of Mrs. Surowitz, which plaintiff's counsel concede is true and correct, has been received in evidence, as Defendant's Exhibit 1, without objection. It reveals that Mrs. Surowitz is an immigrant of limited education who works as a seamstress and that she verified the complaint at the request of her son-in-law of nine years, Irving Brilliant, who brought the document to her in completed form. This was the only occasion on which she discussed the complaint with Mr. Brilliant or with anyone else prior to the time that it was filed.

7. Mr. Brilliant's affidavit describes him as a graduate of the Harvard Law School, whose family owned more than 2,350 shares of Hilton Hotels Corporation stock, now employed as an investment adviser.

8. During the deposition Mrs. Surowitz was asked to state the facts upon which she based the allegations which she had sworn were, to her own knowledge, true and correct. In every material instance Mrs. Surowitz replied that she knew nothing about it and did not understand it.

9. Specifically, Mrs. Surowitz was asked to state the basis upon which she swore that the allegations of paragraph 6 of Counts I, II, III, IV and V that the individual defendants had control over the affairs of Hilton Hotels Corporation were true and correct. She answered, "I don't understand it and I don't know nothing about it."
(Surowitz Dep. p. 15.)

238 10. Mrs. Surowitz was asked to describe the basis upon which she swore that the allegations in paragraph 7 of Counts I, II, III, IV and V, were true and correct. She responded "I don't know nothing. I don't

understand this and I don't know. I can't answer you on that, I don't know." (Surowitz Dep. p. 17.)

11. Mrs. Surowitz was asked to state the facts upon which she swore under oath that the allegations of the last sentence of paragraph 13, in Counts I, II, V and VI, of the last sentence of paragraph 10 of Counts III and IV, of the last sentence of paragraph 14 of Counts VII, VIII and XI, and the last sentence of paragraph 12 of Counts IX and X, that she had protested to the defendant corporation against the gross impropriety of the acts set forth in the complaint, were true and correct. She replied "I don't know nothing about it." (Surowitz Dep. p. 18.) "I don't know, I can't answer you on that neither, because I don't know." (Surowitz Dep. p. 18.) "I can't, I don't know." (Surowitz Dep. p. 19.) "No, I don't understand it." (Surowitz Dep. p. 20.)

12. Mrs. Surowitz was asked to state the basis upon which she stated under oath that the allegations of paragraph 5 of Count VI that the action is not a collusive one instituted for the purpose of conferring jurisdiction upon a court of the United States of a cause of action over which it would not otherwise have jurisdiction, were true and correct. She replied, "I don't know. I can't tell." (Surowitz Dep. p. 19.)

13. Mrs. Surowitz stated in her verification that she made all the other allegations in the complaint upon information and belief and that she believed them to be true.

14. Mrs. Surowitz was then asked to state the facts and information upon which she based her belief as to the correctness of specific allegations she had made on information and belief. In each instance in which Mrs. Surowitz was asked concerning a particular allegation, she replied that she knew nothing about it and did not understand it. She sometimes added that she had left it all to her son-in-law, Irving Brilliant.

15. Specifically, Mrs. Surowitz was asked to state the information she had with respect to the allegation of paragraph 8 of Count I that the explanation set forth in certain documents sent to the stockholders of Hilton Hotels Corporation was false and misleading and was known by the individual defendants to be false and misleading. Mrs. Surowitz replied, "I can't give it to you because I can't explain it to you and I don't know." (Surowitz Dep. p. 21.)

16. Mrs. Surowitz was asked to state the information upon which she formed the belief that defendants carried out a manipulative or deceptive device or contrivance as alleged in paragraph 8 of Count I. She replied, "I can't explain it to you in my words. I don't know." (Surowitz Dep. p. 22.)

240 17. Mrs. Surowitz was asked to state the information upon which she formed a belief as to the truth of the allegation in paragraph 8(a) of Count I that the individual defendants were engaged in a plan and scheme to make it possible for them to dispose of shares in Hilton Hotels Corporation at prices more favorable than they could obtain on the market at a time when they knew or should have known that the business affairs of the corporation would shortly lead to a substantial drop in the value of the shares. She replied "I don't know. I can't explain it." (Surowitz Dep. p. 22.)

18. Mrs. Surowitz was asked to state the facts upon which she based her belief of the truth of the charge in paragraph 8(a) of Count I that the individual defendants were engaged in a plan and scheme to make it possible for defendant Henry Crown to dispose of large holdings in the common stock of Hilton Hotels Corporation at prices above the market price for such stock and under circumstances where the disposal of the stock would not become publicly known. She replied, "I don't know." (Surowitz Dep. p. 23.)

19. Mrs. Surowitz was asked to state the facts upon which she based her belief of the truth of the allegations of paragraph 8(b) of Count I that the individual defendants took the action previously described in such a way as to conceal from the corporation and the stockholders the true purpose of the offer to purchase stock, and in such a way as to make it appear that it was to the corporation's advantage to effect such a purchase of approximately 10 per cent of its outstanding shares. She replied "No, I don't know. I don't know." (Surowitz Dep. p. 24.)

20. Mrs. Surowitz was then asked the following general question and made the following answer:

"Q. Do you know any facts, Mrs. Surowitz, at all, upon which you based these allegations?

"A. I don't know. I can't give you no facts because I don't understand it." (Surowitz Dep. p. 24.)

21. The transcript discloses that there was then a short recess and thereafter the following took place:

"Mr. Block: Let the record show that Mr. Watt and Mr. Block have now discussed the further questioning with respect to the information upon which the witness had formed the belief to which she swore and it is agreeable that I ask the following question:

"By Mr. Block:

"Q. Mrs. Surowitz, if I ask you about each of the other allegations of the complaint to which you have sworn on information and belief as being true and correct and that you believe them to be true and correct, your answer would be the same, would it not, that you have no information as to those?

"A. I have no information because my son-in-law, I left it to him, and he was the one that knew all about it." (Surowitz Dep. pp. 24-25.)

242 22. Mrs. Surowitz stated that she did not know any of the individual defendants personally and, in response to a question concerning whether she knew anything which would indicate that they were not men of honesty and integrity, stated that she knew nothing about them. (Surowitz Dep. p. 14.)

23. Finally, Mrs. Surowitz was asked if she knew of any action wrongful or improper done by any officers or directors of Hilton Hotels Corporation. Her reply was "I couldn't—all I know was that my stock wasn't right and that's all." (Surowitz Dep. p. 21.)

24. Mrs. Surowitz stated that she had not met Mr. Richard Watt, chief counsel for the plaintiff in this action, until the day before the deposition. She stated that she had met Mr. Walter J. Rockler, Mr. Watt's partner, on one prior occasion but could not recall whether this was before or after the filing of the complaint. Mrs. Surowitz stated that the expenses of her trip to Chicago for the deposition were paid by her son-in-law, Mr. Brilliant, and that she was staying at the home of her counsel, Mr. Rockler. On advice of counsel she refused to answer any further questions concerning the existence or nature of any arrangements for the payment of legal fees or disbursements in the litigation. (Surowitz Dep. pp. 10-11, 25-26.)

25. After Mrs. Surowitz had been examined by defendant's counsel, she had a conference with her attorneys in another room. Her counsel then undertook to examine her further. During this examination by her own counsel, Mrs. Surowitz merely stated that she remembered that the dividend of Hilton Hotels Corporation was passed sometime in 1963 and that she so informed Mr. Brilliant, who stated that he would try to see what was wrong that she didn't get any dividends. She also testified that in December, 1962, she received an offer by Hilton Hotels Corporation to purchase her stock,

a copy of which offer was attached to the complaint. She gave this document to Mr. Brilliant. She testified that Mr. Brilliant was her financial adviser and that she relied upon him. (Surowitz Dep. pp. 28-34.)

26. Under examination by her own counsel, the only testimony which Mrs. Surowitz gave concerning her verification of the complaint was in response to the following series of leading questions:

“By Mr. Watt:

“Q. Now at the time, Mrs. Surowitz, that you signed the complaint which Mr. Block has asked you about, did you discuss Hilton Hotels Corporation with your son-in-law?

“A. Yes.

“Q. Did he explain to you what he thought was wrong with the handling of certain transactions by the corporation?

“A. Yes, he explained it to me.

“Q. After that explanation to you, did you sign the complaint?

“A. Yes.” (Surowitz Dep. pp. 33-34.)

27. Thereafter, upon examination by defendants' 244 counsel, Mrs. Surowitz was asked the following questions about the three leading questions quoted in the preceding paragraph:

“By Mr. Block:

“Q. Mrs. Surowitz, when we adjourned this deposition, you went into a room with your counsel, did you not? Just a few minutes ago?

“A. Well, we went into the room.

“Q. And at that time isn't it correct that either Mr. Rockler or Mr. Watt told you that they would ask you the last three questions that were asked you and told you what to answer?

"A. I don't know what I—we didn't say anything.

"Q. Pardon me?

"A. We didn't say nothing about it.

"Q. You didn't say anything? How long were you in the room?

"A. I didn't time myself.

"Q. If I told you you were in the room about 15 minutes, would your answers still be that you didn't say anything while you were in there?

"A. No.

"Q. At that time isn't it correct that they told you that they would ask you these questions about your discussions with Mr. Brilliant?

"A. I refuse to answer that." (Surowitz Dep. pp. 34-35.)

245 28. She gave no testimony under examination by either her own counsel or counsel for the defendants, concerning the nature of her charges against the directors of Hilton Hotels Corporation or the basis for the allegations to which she had sworn under oath. At no time did she attempt to state in even the most simple or rudimentary terms the nature of her grievances or of the charges made in the complaint. Mrs. Surowitz at no time stated that any of the allegations of the 92 page complaint were, to her knowledge, true and correct, nor that any of such allegations were believed by her to be true and correct, based upon information and belief.

29. I find that the failure of Mrs. Surowitz on her deposition to supply any information whatever about the nature of the charges in the complaint or about the basis for her sworn statement that these charges were true and correct, or that she believed them to be true and correct, was not caused by the use of technical or legal language in the questions or by her failure to understand what was being asked. Plaintiff's counsel have in effect

conceded the truth of this finding by their acquiescence in the general question and answer by which Mrs. Surowitz stated that she had no information about any of the other allegations concerning which she had not been specifically examined, and by the failure of plaintiff's counsel to obtain from Mrs. Surowitz any information about the nature or basis of the charges in the complaint during their examination of her, despite a private conference before 246 this examination and despite the liberal use of leading questions.

30. At the request of counsel for plaintiff on February 26, 1964, the Court granted 15 days to file appropriate documents opposing defendants' motion to dismiss. On March 12, 1964, plaintiff filed, in opposition to the motion to dismiss, the affidavits of Irving G. Brilliant and Walter J. Rockler.

31. These affidavits contain much detail concerning purported investigations made by Messrs. Brilliant and Rockler of the affairs of Hilton Hotels Corporation. The affidavit of Mr. Brilliant states that he or members of his family in December, 1962, owned in excess of 2,350 shares of the common stock of Hilton Hotels Corporation, as well as \$10,000 of the 6% debentures due in 1984, and 110 stock purchase warrants of the corporation. The affidavit states that Mr. Brilliant believes that there are reasonable grounds for the maintenance of this derivative action. However, the affidavit goes on to state that Mr. Brilliant decided that his wife should not be a party plaintiff because of her health, and that he should not be a party plaintiff in a fiduciary capacity "because of possible legal complications that might be entailed." Instead, he asked his mother-in-law, Mrs. Surowitz, whom he describes 247 as a "hard working woman of limited education who reads very little English and has some difficulty in understanding English," if she would act as plaintiff in

this action. The affidavit states that Mr. Brilliant told Mrs. Surowitz that it was reasonable to assume that "members of the family" would be willing to pay "a major portion of the expenses of the litigation." Mrs. Surowitz agreed to act as plaintiff and executed the verification. Mr. Brilliant states in a conclusory fashion that he "read and explained" the complaint to Mrs. Surowitz before she verified it. Mr. Rockler's affidavit indicates that he dealt only with Mr. Brilliant and that he forwarded the complaint to Mr. Brilliant for verification, received back the executed document, and filed it with this court. The affidavit contained no other statements concerning the knowledge on which Mrs. Surowitz based her verification or the arrangements concerning the contemplated payment of legal fees and disbursements in connection with this litigation.

32. Plaintiff's counsel argued that such affidavits furnished the basis for a finding that there was compliance with the requirements of Rule 11 of the Federal Rules of Civil Procedure in that such counsel has reasonable grounds for filing the complaint.

33. The unequivocal evidence of plaintiff's own testimony 248 many demonstrates that at the time she verified the complaint under oath, she was not in fact familiar with any of the allegations of the complaint, did not in fact know any of them to be true and correct, and did not in fact have any belief or any information upon which to base a belief that any of the allegations were true and correct. Insofar as the general language in Mr. Brilliant's affidavit attempts to imply that Mrs. Surowitz understood the allegations of the complaint or the nature of the charges against defendants, any possible implication to this effect is destroyed by the conclusory nature of Mr. Brilliant's statements, and by the testimony of plaintiff herself which shows a complete lack of knowledge concerning the complaint or charges made in the complaint.

34. Plaintiff's counsel have not asked for leave to file a substitute verification or an amended complaint.

35. The affidavit of Mr. Brilliant discloses that the cost of the action is to be shared by others than plaintiff pursuant to a "reasonable" understanding. No disclosure of such understanding appears as an exception to the affidavit filed herein pursuant to the requirements of Rule 39 of the Rules of the United States District Court for the Northern District of Illinois, Eastern Division.

Conclusions Of Law.

On the basis of the foregoing findings of fact, the 249 Court makes the following conclusions of law:

1. This action is a stockholders' derivative action and therefore Rule 23(b) of the Federal Rules of Civil Procedure requires that the complaint be verified under oath. The complaint was filed with an affidavit of the plaintiff attached thereto which purported to be the verification required by Rule 23(b).

2. The verification of Mrs. Surowitz was false for the following, among other, reasons:

(a) it states that she had read the complaint and was familiar with the matters therein alleged, whereas in fact she had no knowledge whatever concerning the allegations of the complaint or even concerning the general nature of the charges made in the complaint;

(b) the verification states that certain allegations of the complaint were, to her knowledge, true and correct, whereas in fact she admitted that she has no knowledge whatever concerning these allegations; and

(c) the verification states that she made all of the other allegations in the complaint on information and belief and believed them to be true, whereas in fact she has no information or belief or knowledge concerning

any of the allegations of the complaint or even concerning the general nature of the charges made in the complaint.

250 Accordingly, the verification was a nullity and did not constitute the verification required by Rule 23(b).

3. The requirements of Rule 23(b) are in addition to those of Rule 11. The latter Rule applies to all actions filed in the Federal Courts. Rule 23(b), however, provides additional protection against the filing of sham or frivolous complaints, and against the evil of attorneys or others maintaining shareholders' derivative suits by seeking out and inducing shareholders, without knowledge of alleged wrongdoing, to lend their names as plaintiffs. Accordingly, it is not a sufficient compliance with Rule 23(b) to attach a false verification or the verification of a person who has now knowledge or understanding concerning even the general nature of the charges made in the complaint and who executes the verification in blind trust and faith on the general assurance of some other person that he thinks there is sufficient basis for the allegations.

4. The purpose of the verification required under Rule 23(b) is to permit defendants to examine plaintiff concerning the factual basis upon which the allegations of a complaint are made before defendants are required to proceed with the extremely costly and burdensome task of discovery to such complex cases. If the purpose of this requirement is to be accomplished, the person verifying the complaint must at least understand the nature of the charges in
251 the complaint and have some knowledge concerning the factual basis for those charges.

5. The verification of this complaint is false and sham and the complaint must be stricken. Since the plaintiff has not sought leave to substitute any other verification or file an amended complaint, the action will be dismissed.

Judgment.

6. The affidavit filed pursuant to Rule 39 of the Rules of this Court is false in that it fails to set forth an understanding as to the sharing of costs and expenses. The filing of a false affidavit is equivalent to the filing of no affidavit at all. Absent such an affidavit, the complaint must be stricken and the cause dismissed.

Wherefore, It Is Ordered that the complaint in the above entitled cause, and the cause be and the same are hereby dismissed with prejudice, with judgment entered against plaintiff and in favor of defendants for costs and expenses.

Enter:

Julius J. Hoffman,
Judge, United States District Court.

Dated: March 30, 1964.

315 IN THE UNITED STATES DISTRICT COURT,
 for the Northern District of Illinois,
 Eastern Division.

Dora Surowitz, individually and on
behalf of all other similarly
situated shareholders of Hilton
Hotels Corporation,

Plaintiff,

vs.

Hilton Hotels Corporation, a cor-
poration, Conrad N. Hilton, Rob-
ert P. Williford, Robert J. Caverly,
Joseph P. Binns, Spearl
Ellison, Henry Crown, Horace C.
Flanigan, Benno M. Bechhold,
Y. Frank Freeman, Willard W.
Keith, Lawrence Stern, Sam D.
Young, Fritz B. Burns, Vernon
Herndon, Herbert C. Blunck,
Charles L. Fletcher, Robert A.
Groves, Joseph A. Harper, Bar-
ron Hilton, and Hilton Credit
Corporation, a corporation,

Defendants.

Civil Action
No. 63-C-2248
Equitable Relief
Requested.

NOTICE OF APPEAL.

Notice is hereby given that Dora Surowitz, Plaintiff herein, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the Judgment Order of the District Court entered herein on March 30, 1964, dismissing the Complaint, said order containing and setting forth the Court's Findings of Fact and Conclusions of Law.

Plaintiff-Appellant prays that said order be reversed and that the cause be remanded to the District Court with directions to vacate its March 30, 1964 Findings of Fact, Conclusions of Law and Order of Dismissal, to reinstate the Complaint, to order the defendants to answer said Complaint within an early date. Plaintiff-Appellant 316 also prays that this Court award her the costs of this appeal.

The defendants are represented by the following attorneys of record, whose addresses are shown:

Hilton Hotels Corporation,
represented by
A. Leslie Hodson
Don H. Reuben
E. W. Johnson
Lawrence Gunnels
2900 Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601

Henry Crown,
represented by
Samuel W. Block
Keith F. Bode
Philip W. Tone
John J. Crown
Suite 330
135 South LaSalle Street
Chicago 3, Illinois

All other defendants,
represented by
William J. Friedman
Howard R. Koven
Stanley R. Zax
Suite 1130
208 South La Salle Street
Chicago 4, Illinois

317 Altheimer, Gray, Naiburg,
Strasburger and Lawton
Suite 1825
One North LaSalle Street
Chicago 2, Illinois

Alan J. Altheimer,
Lionel G. Gross,
Howard L. Kastel,

Cotton, Watt, Rockler & Jones
Suite 2900
105 West Adams Street
Chicago 3, Illinois

Richard W. Watt,
Walter J. Rockler,
David R. Kentoff,

By Richard F. Watt,
Attorneys for Plaintiff-Appellant.

SUPPLEMENTAL APPENDIX

Page of
Record

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- 1-6* Transcript of hearing on January 6, 1964 regarding motions by some defendants to extend time to answer or otherwise plead to the complaint to March 2, 1964.
- 7-9 Transcript of hearing on January 31, 1964 regarding motions of defendants Stern, Keith and Ellison to extend time to answer or otherwise plead to March 2, 1964.
- 10-20 Transcript of hearing on February 7, 1964 regarding plaintiff's motion to postpone the taking of plaintiff's deposition by defendants. Following is a portion of that proceeding:
- • •
- 13 The Court: Now I will hear you, Mr. Watt.
Mr. Watt: Thank you, your Honor.
This case, your Honor, was filed in December, and it was filed by a New York stockholder, Dora Surowitz, a stockholder in Hilton Hotels Corporation. It is a rather lengthy complaint with a number of exhibits attached, and, in essence, it charges certain improprieties by the officers and directors of the Hilton Hotels.

* Page references in this Supplemental Appendix are to reports of proceedings before the trial court. Page references in appellant's appendix are to the rest of the record.

Transcript of Proceedings

The Court: I had it up here on the bench one day in connection with some other motion, and I weighed it, but I didn't read it.

- Mr. Watt: Essentially it charges failure to disclose and misrepresentations under various sections of the Securities Act of 1933 and the Securities & Exchange
14 Act of 1934 with respect to two transactions; (1) Whereby the Hilton Hotels Corporation purchased from shareholders some 300,000 shares, and it is claimed in the complaint that there was not full disclosure with regard to that, and there were misrepresentations made with regard to that.

Secondly, it has to do with the purchase by the Hilton Hotels Corporation of a large number of shares of Hilton Credit Corporation. It is likewise alleged that with respect to that that there was failure to disclose and misrepresentation and that as a result the shareholders had been damaged by the waste and improper diversion of corporate funds.

- Early in January some of the defendants who had up to that point been served and filed appearances came before your Honor and indicated that inasmuch as all defendants had not been served, and many of the defendants, that is, directors, do not reside in Illinois, and would have to be served where they do reside, that they ask until March 2, in which to plead. Subse-
15 quently an additional group of these directors were served with process, and your Honor entered an order likewise giving to those defendants until March 2 to plead, and, I assume, that those defendants who have thus far have just been served will likewise seek similar extension of time.

Colloquy

At about the same time we were served with notice to take the deposition of the plaintiff, Mrs. Surowitz on the 25th or 26th of this month, which would be about six or seven days prior to the time by reason of the extensions that the defendants have within which to answer or to otherwise plead.

We recognize that under the rules and the decisions that having been served with notice, and it being an out-of-state plaintiff, that it is appropriate for Mrs. Surowitz to appear and give her testimony here which we are prepared to do at a proper time.

16 However, I would suggest this: That in the absence of some showing that there is any need on the part of the defendants to have her testimony before they are in a position to answer a plea would be more expeditious, and, I believe, a more orderly way to proceed, if we had a statement of the defendants' position by their pleadings so that we would know not only what the issues are as pleaded by us in the complaint, but what additional issues or defenses there may be that the defendants wish to assert, because if we have Mrs. Surowitz and bring her here and review the matters with her for purposes of the deposition to be taken before any pleadings are filed on behalf of the defendant, we cannot know—all we can do is conjecture—what additional issues, if any, the defendants may have in mind at which they may wish to put in their pleadings.

I think that we are entitled in order to properly represent her and to review the matters with her which may come up by her deposition to know what the issues are which the defendants are going to assert by their pleading or answer, we, therefore, request

Transcript of Proceedings

that the time for the taking of her deposition be continued to some period roughly ten days or two weeks after they have pleaded. We will at that time produce
17 her here so that they can take her deposition.

The Court: I take it from the fact that all the defense lawyers are standing at attention there that this motion is opposed.

Mr. Block: Your Honor, it is.

Mr. Koven: That is correct, your Honor.

The Court: Before I call on the lawyers for the several defendants to reply, I think Mr. Watt should tell me first something about Dora Surowitz, your client. Where does she live?

Mr. Watt: She lives in New York, your Honor.

The Court: In what capacity is she suing here?

Mr. Watt: She is suing in the capacity of a shareholder of Hilton Hotels Corporation.

The Court: And what is the extent of her holdings?

Mr. Watt: I am not certain of the precise number of shares she holds, your Honor, I couldn't state that to you. It is not a large number of shares.

The Court: Has she signed the complaint herself?

Mr. Watt: She has, yes, sir.

The Court: Under oath?

18 Mr. Watt: It is under oath. I should state with regard to the overwhelming portion of the allegations that are set out in the complaint, it is on the basis of information and belief.

The Court: I would like to give you my feeling about this section of the rules which—rather the rule which permits depositions to be taken after proper notice and before issue joined.

Here is a case which you tell me there are some very serious charges made against men, who not only here,

Colloquy

but throughout the country, that is not to say, that men widely known here throughout the country may not be guilty of the charges set out in the complaint.

But, I believe, this: That when charges like that are made, I think, that the defendants against whom they are made, have the right, if they choose to assert it promptly—postponing the taking of the deposition, that will be quite all right with me—but they should have the right if they choose to assert it, to find out what the plaintiff knows about this case.

- 19 Now I have had these situations in similar cases, and we have not infrequently had these situations in connection with proposed murder cases, and I always allow the taking of depositions under rules like that.

As a matter of fact, if this motion is opposed—unless the lawyers want to say something—

Mr. Block: No, your Honor, I think, your Honor has—

The Court (Continuing): — I will be glad to hear from each and every one of you.

Mr. Koven: No, your Honor has expressed our sentiments.

Mr. Watt: Thank you, your Honor.

Mr. Block: Thank you, your Honor.

The Court: Your motion will be denied.

* * *

- 21-30 Transcript of hearing on February 20, 1964 regarding motion for leave to enter appearance of A. L. Hodson, Don H. Reuben, E. W. Johnson and Lawrence Gunnels as attorneys for the defendant Hilton Hotels Corporation and for an additional sixty days to answer or otherwise plead for that defendant.

Transcript of Proceedings

31-53 Transcript of hearing on February 26, 1964 regarding defendants' motion to dismiss. Following are excerpts from that proceeding:

32 Mr. Block: Good morning, your Honor. The Court may recall that sometime ago we had scheduled the taking of the deposition of Dora Surowitz, the plaintiff, and counsel for Mrs. Surowitz came before the Court and asked that the deposition be postponed until we had answered so that they could determine in what areas our questioning might go. The Court at that time pointed out that these charges contained in the complaint were grave, indeed, made against men of standing in the community, and while that last point did not in any sense guarantee that they were not guilty of the charges, it did entitle them to learn promptly under what circumstances such charges had been made.

We took Mrs. Surowitz' deposition yesterday, your Honor, and now come before this Court in what I think is a rather unusual proceeding to point out immediately the basis for these grave charges. We have indicated in our notice and motion that we rely
33 upon Mrs. Surowitz' deposition which has been written up by Mrs. Brackenbury and I believe is before the Court.

* * *

35 The Court: I interrupt to say I do not have a copy of the complaint here.

Mr. Block: The complaint?

The Court: Is the complaint under oath?

Mr. Block: Yes, your Honor, and we come before your Honor on two of the federal rules, the first being 23.

Colloquy

The Court will recall that the complaint is some 92 pages long with 13—

The Court: I remember seeing it. I had forgotten whether it was under oath or not.

Mr. Block: It is, your Honor, as Rule 23 requires it to be, and if the requirement of Rule 23 is to be anything else than a complete nonentity, a completely pointless thing, then this is the type of complaint which should not be permitted.

* * *

36 Now, your Honor, the defendants in this case are entitled to know upon what this plaintiff claims to base these allegations which she makes on behalf of all of the thousands of shareholders of Hilton Hotels Corporation.

Mr. Watt finally, after a short intermission, agreed that if I asked her the same question as to all of the allegations, her answer would be the same.

* * *

42 The Court: It is extraordinary when one looks at the jurat which one has before him and compares it with the sworn testimony of the witness, and the copy of the transcript I have here has appended to it the affidavit of the reporter who took the testimony.

Mr. Watt: I am not questioning the accuracy of the transcript. I haven't studied it carefully or closely enough to know whether there are any matters that were not accurately transcribed. That is not the point I wish to make.

The Court: I will give you a chance to look at the transcript.

Transcript of Proceedings

Mr. Watt: What I would like to suggest is that they have now filed an affidavit as of this date as to the date on which the stock was placed in her name of record. It is our understanding that it was in street name, in spite of the fact it was hers since 1957. We would like an opportunity to file an answering
43 affidavit and it should be heard under Rule 13(a) as a contested motion. We are certainly prepared to argue it.

The Court: This kind of motion should be heard orally. I don't need any briefs on it. I am not prejudging you, but it is a factual matter. I don't know how you will meet factually the affidavit which is appended to the complaint when compared with the answers of the plaintiff made yesterday.

Mr. Watt: I would simply say as a matter of observation I believe the witness who testified that so far as investment matters were concerned, she relied on her son-in-law.

The Court: Well, I would say that I don't think we need reach the question of stockholdings here. I would consider it also. Here is a person who swears under oath:

"Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing complaint by her attorney subscribed, and is familiar with the matters therein alleged."

It then goes on to tell about which allegations, the
44 numbers of them, are true and correct, and that as to all other matters alleged in the above and foregoing complaint, she makes said allegations on information and belief and believes them to be true.

Colloquy

Now how would you have me reconcile the allegations in that affidavit with the sworn testimony of the plaintiff as it appears from this transcript?

Mr. Watt: Well, your Honor, I believe it can be reconciled. I believe as a matter of law that the motion is not well founded, but we would like—

The Court: Point it out to me.

Mr. Watt: We would like an opportunity to be heard if we may.

The Court: I give you the opportunity. This is a matter, this kind of a motion, which is something the Court has to look at very seriously.

Mr. Watt: I quite understand, your Honor.

The Court: If the position of the defendants as presented by Mr. Block and supplemented by Mr. Reuben is correct, you agree, do you not, as a member of the Bar of this Court that it is quite serious?

45 Mr. Watt: I agree that the issues—

The Court: Quite apart from the issues in the lawsuit?

Mr. Watt: I agree the issues presented by this to the Court is a serious issue which should be heard and considered at a time when we have prepared ourselves to argue the matter before your Honor. That opportunity we have not had because we were noticed at 3:30 yesterday afternoon.

• • •

46 The Court: Mr. Block, I take it in the interest of making a full record here that is correct in every detail, an opportunity should be given to the plaintiff to file such documents in opposition to your motion

Transcript of Proceedings

47 as are thought to be appropriate. I would say that this deposition has not been filed formally, has it?

Mr. Block: No, your Honor, it has not.

The Court: Whatever action the Court might take here would be based on the sworn testimony and of course the sworn complaint.

How much time do you think you would need?

Mr. Watt: We would like 15 days within which to file opposing affidavits, your Honor, and we will be ready at an appropriate date thereafter to present argument if your Honor wishes it done on the basis of oral argument. We will be prepared.

• • •

49 The Court: The clerk is directed to file the deposition of the plaintiff.

Fifteen days to the plaintiff to file such documents as her counsel might think appropriate in opposition to this motion.

• • •

54-57 Transcript of hearing on March 12, 1964 regarding plaintiff's motion to transfer case to Executive Committee under the related cases rule.

58-132 Transcript of hearing on March 23, 1964 containing the argument on defendants' motion to dismiss action. Following are excerpts from that hearing:

• • •

59 Mr. Block: This action, your Honor, in which this motion is filed, is a secondary action, a derivative
60 action by a shareholder which, pursuant to Rule 23 of the Federal Rules of Civil Procedure, must be verified by the plaintiff.

Colloquy

Now the court at the time we made this motion commented on the nature of the oath which was taken by the plaintiff here and made a part of the complaint. The oath is that the plaintiff read the complaint, that the plaintiff was familiar with the matters alleged, that the same were true and correct except as to those which were alleged upon information and belief, which the plaintiff believed to be true.

Now it is not necessary to belabor the point here that the plaintiff had no knowledge of any kind of this proceeding and no understanding. In fact, the plaintiff didn't even understand the meaning of the word "tender" which was the basis of the action.

* * *

62 Mr. Block: Now, your Honor, this motion is not
made, as certain cases point out, on the basis of an affidavit of the defendants that there is no truth to the allegations of the complaint. This motion is made because the pleading has not been verified as required by Rule 23. It is a sham and it is an imposition on this court.

* * *

63 Mr. Block: Now here is a woman who has brought
64 before this court this action. The affidavit of Mr. Rockler or Mr. Brilliant, I forget which, is that she was a woman of limited education, owned 100 shares of stock. She says she owned 100 shares of stock. One of our affidavits indicates that she didn't transfer them into her own name, if she ever owned them, until 1963. But she has brought before this court as a plaintiff required to swear to an exceedingly grave charge and she is absolutely unable to give the defendants any reason at all for her charges.

Transcript of Proceedings

Now the defendants in a case like this, your Honor—and I believe this is the reason for Rule 23—must be permitted to ascertain the basis for these serious charges. There is a tremendous cost to all the shareholders of this corporation, thousands of them, in meeting these grave charges. We have a right to proceed against the plaintiff if, as we respectfully suggest, these charges are without foundation.

65 Now it is very easy for someone like Mr. Brilliant—and I will come to his affidavit in a minute—it is very easily for someone like Mr. Brilliant to get this poor old lady to come in here and sign this complaint and then say, "I don't know anything about it." She has no knowledge, she doesn't even understand what she signed.

The Court: It might be very easy but very dangerous.

Mr. Block: That is what we say, your Honor.

But this man Brilliant is not before this court. This court cannot impose the sanctions that I suggest this court might well be inclined to impose if Mr. Brilliant were before this court. It is not, as I say, an attempt to strike the allegations of the complaint because they are not true, because we say, the defendants say they are not true; it is because the plaintiff in this case filed a false affidavit when required to swear to the complaint under Rule 23, and the defendants cannot attack the allegations by proving from the affiant their falsity.

. . .

81 Mr. Block: Now, your Honor, if there was ever a reason for Rule 23(b) it is contained in those affidavits

Colloquy

because here are these defendants charged with grave, grave civil wrongs who are denied an opportunity to ask anyone what the basis of those is.

The legal complications, I suggest to this court, that Mr. Brilliant was talking about are those attendant upon bringing a suit without factual basis. The poor old plaintiff dressmaker could take that rap, but that is exactly what Rule 23(b) is designed to prevent. The plaintiff must swear to the complaint and must be prepared to back up the affidavit with some facts.

This plaintiff has not met the requirements of Rule 23(b) and the pleading, your Honor, we suggest is a sham.

• • •

87 The Court: I should like to get your answer to this
88 question, Mr. Friedman: Rule 23(b) says among other things that the complaint shall be verified by oath. Now to me, unless I am shown by competent authority to the contrary, "by oath" means an honest oath. Certainly it doesn't mean that a complaint should be verified by a false oath.

If I am right in my—let's say my inclination to believe that, then we do not have in fact an oath here; we have a signature put to a complaint admitted to be false. False is an ugly word, I am sorry to have to say that to a member of the bar of this court, the lawyers representing the plaintiff, but everything points to the fact that there was a false oath.

I appreciate that a thing can be false without the affiant being really the principal culprit. I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, induced her to sign it but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this

Transcript of Proceedings

woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant, who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does.

Now I want to ask you and other counsel for the defendants whether you have researched the meaning of that. We know what an oath ordinarily means, of course, but it strikes me that those who wrote this rule put the provision in there for an oath so that there would be some responsibility on the part of the plaintiff and not make it a very loose one.

Do you have any opinion about that?

* * *

94 The Court: Unless you can convince me to the contrary, I don't regard the use of the word "sham" in Rule 11—and I concede you as far as I can remember that rule is the only rule in which the word is used—but it strikes me that a pleading can be worse than sham. Sham may turn out to be a very charitable word used in connection with what is apparent to a person reading this complaint and then reading a transcript of the testimony of the plaintiff which has been admitted into evidence here as Defendants' Exhibit 1. I think it is far more serious, and I express no opinion at this particular point as to whether the
95 seriousness of the facts warrant dismissal. I will get to that. But just the use of the word, the simple use

Colloquy

of the word "sham" in Rule 11 doesn't preclude, it seems to me, the court from dismissing a complaint for more serious objections.

Mr. Watt: I am not saying that it does, your Honor. What I am saying is this: As I had understood the motion as it was presented in writing, it was a motion to dismiss on the grounds that the complaint was a sham. In endeavoring to ascertain what is meant by that and in looking in the rules and the cases, the only rule in which a sham pleading is referred to and in which grounds for dismissal are set forth, to my knowledge, is Rule 11.

If I understand Mr. Block's argument, however, in considerable part he is relying on Rule 23(b), stating that on the basis of the deposition of the plaintiff, it is possible to conclude without doubt, as he has argued, that the verification is false and therefore it is the equivalent of no verification at all, and that therefore there may be a dismissal by reason of failure to comply with Rule 23(b).

96 That may be the position that Mr. Block has urged and I say that is a different position from contending that the complaint is sham and false within the meaning of Rule 11 of the Federal Rules of Civil Procedure.

I want to come to the question as to the assertions made by counsel that it is obvious that the verification is false because I don't think it is obvious at all.

* * *

122 Mr. Watt: Secondly, insofar as it is contended that
this is a sham pleading, I say to the Court two things:
123 Counsel have complied with requirements of Rule 11
literally, completely, fully, diligently, and honestly, and

Transcript of Proceedings

I say, so far as concerning the deposition of Mrs. Surowitz, it is not proper on the circumstances of that deposition and the answers given by that woman, to conclude that her verification is false.

What it shows is that this is a woman whose sophistication is minimal. It shows that—

The Court: I don't know what you mean by the word "sophistication" used in a lawsuit.

Mr. Watt: I mean a person who cannot, in the nature of things, by virtue of experience, background, education, and so on, understand the intricacies of Securities Act provisions, to understand the intricacies of corporate financing, to understand the intricacies that are set out in the documents attached to the complaint. Such a person necessarily—

The Court: I accept your definition as what you perceive the word to mean, and I ask you then, because a person is unable to appraise the conduct of parties who she is charging with certain conduct, under oath, does that say that a court may permit that unsophisticated person, as you characterize her, to of record charge individuals with serious misconduct when, as
124 in this case, her son-in-law's affidavit asserts that he is the owner of a substantial number of shares in this corporation?

Now, I am not saying that it was his obligation to make himself a plaintiff in this case, if, indeed, for reasons he thought proper, his mother-in-law was the one to be to blame. But you make so much of the word "sophistication" or lack of it. You used it several times here. You wouldn't have had to use it if Mr. Brilliant was the plaintiff here. I grant you there was no obligation on his part to be the plaintiff.

Colloquy

It seems to me that, in a lawsuit, the fact that a person is illiterate or unsophisticated or having no knowledge of facts doesn't give them the right to file a complaint under oath making such serious charges as are made here. Whether that is the law or not, we will find out.

Mr. Watt: If that person, however untutored, relies on what is told to her by someone in whom she has confidence, and that person tells or informs the plaintiff that, himself, or herself, has done his or her level best to ascertain facts, and relates to the plaintiff what he or she has discovered, then I would say
125 a person could be illiterate and still be justified in relying upon what was told to her, and be in a position in which she could say that she honestly believed certain things.

. . .

126 The Court: Mr. Block, do you care to reply?

Mr. Block: Only one thing, Your Honor.

I think that there are some misunderstandings that Mr. Watt has sought to create, but I don't believe they will be created here.

127 We are not seeking to establish an intelligence test for shareholders; we are seeking to obtain from this Court a ruling that Rule 23(b) must be complied with, that an oath means what it says; that when a plaintiff says, "I know these facts and I have an understanding of these other facts, these facts on which I have information and belief as to those facts," and then is unable to give any information at all as to the basis of those sworn statements, that has not been compliance with Rule 23(b).

. . .

Transcript of Proceedings

129 The Court: It seems here that the Court must approach the consideration of this motion on the question of whether or not there has been compliance with the provisions of Rule 23(b) of the Federal Rules of Civil Procedure. If there has not been, it is not necessary for the Court to reach the question of whether or not the provisions of Rule 11 have been complied with.

Now, this deposition, Defendants' Exhibit 1 in evidence, indicates that Mrs. Surowitz, who verified the complaint, has personally no information in regard to the allegations of the complaint, allegations which she has sworn are true or that she believes are true.

At page 14 of the deposition, Mrs. Surowitz states that she knows nothing about any of the individual defendants. It is true that she says that she relied upon her son-in-law, Mr. Brilliant, but if it is the law that a person can make the kind of oath required under
130 Rule 23(b), knowing nothing about the facts, I don't think any of the cases cited to me say that is true.

With respect to Mr. Watt's opinion or suggestion about summary judgment, a motion for summary judgment being the proper remedy in respect to matters quite apart from whether or not the record indicates compliance with 23(b), I am inclined to be sympathetic to that position. I don't have to reach it here, however, because I think the complaint, the oath to the complaint, and the language of Rule 23(b), require me to allow this motion to dismiss.

In ordinary circumstances, the rule does not require the Court to make findings of fact and conclusions of law in a motion of this kind. However, since, if this case is reviewed, it would be well for the Court of

Colloquy

Appeals to have before it the findings of the Court and the Court's view of the law, I would suggest that counsel for the defendants prepare a draft order with a preamble reciting language by the Court and findings by the Court, and conclusions of law which justify an order dismissing the complaint.

The order, Mr. Clerk, will be that the motion of the
131 defendants to dismiss this complaint will be allowed.

. . .

133-187 Transcript of hearing on March 27, 1964 containing the argument on proposed findings of fact and order of dismissal. Following are excerpts from that proceeding:

. . .

151 Mr. Watt: I am now addressing myself to finding paragraph 12 at the bottom of page 5 and the top of page 6.

I am wondering how many lawyers would be in a position to explain the significance of a collusive suit under Rule 23(b), and I'll bet there isn't a layman out of ten million that can explain it.

The Court: Oh, that may well be, but that's no excuse for swearing to an allegation if she doesn't understand it. Then you should get somebody to make oath to a complaint who does.

. . .

153 Mr. Watt: I think there has to be established something further here, namely that certain of the facts which are set out are, in fact, false, and that the person had no basis whatsoever for a belief at the time that the statement was made.

Transcript of Proceedings

The Court: I don't agree with that. The rule says, Rule 23(b), that the complaint must be sworn to. If you swear to allegations that aren't true, that is not a proper oath in my opinion, and that is what I am holding here.

Mr. Watt: I understand, your Honor, but I think
154 it also ought to be clear there are certain allegations in the complaint which she swore to which are indubitably true, namely that she is a stockholder, namely that this is not a collusive suit, namely that she did protest, even though when the question was asked her, she didn't know what the question meant; but the fact is these gentlemen received the letter with her signature, she said it was her signature. How it is possible to say that in those respects her verification is false absolutely escapes me.

Turning over to paragraph 14 on page 6 and subsequent paragraphs, and reading those in light of what was asked of Mrs. Surowitz in the course of her deposition, seems to me very unjust. The questions were in almost every instance couched in legal language. Questions were asked and when she didn't understand it, no effort whatsoever was made to clarify the matter by counsel. No effort was made to break the question down into language which an ordinary layman can understand.

The Court: Did you object to the question?

Mr. Watt: I objected to some of the questions,
155 yes.

The Court: All of them?

Mr. Watt: Not to all of them, no, sir. This was not my deposition. There were no—

The Court: You have a right to participate in it.

Colloquy

Mr. Watt: There were no pleadings on file. There were no motions on file at the time.

* * *

163 Mr. Watt: Paragraph 31 on page 13, there are certain findings there which are used, I take it, for the purpose of suggesting that when Mr. Brilliant decided that his wife should not be a party plaintiff because of her health, that that was somehow or other not a decision which was perfectly proper for the man to make under the circumstances, and when he decided that as a fiduciary he should not sue because there might be some legal complications, that there is something invidious about that. I don't think that those findings have any place here. I don't think there is any justification for their inclusion if the purpose is to suggest that what Mr. Brilliant decided is somehow or other improper.

164 The Court: Those are the allegations in substance of the affidavit, are they not?

Mr. Watt: That is quite right, your Honor, but the effect of that assertion in here, the effect of many other assertions with regard to the affidavits of Mr. Brilliant and Mr. Rockler is to have the court in effect weigh the evidence and construe the affidavit, and I humbly submit to your Honor that the effect of these findings has the court weigh and construe those affidavits and Mrs. Surowitz' deposition in a manner most favorable to the moving party in this case. I think in a motion of this kind, particularly where the affidavits were filed in connection with the role of counsel in a sham complaint motion under Rule 11, those affidavits, absent something else, simply must be taken as representing the facts that they state and that it is not properly the function of the court at this stage of the

Transcript of Proceedings

proceeding to endeavor to weigh the affidavits or to use them and the deposition of Mrs. Surowitz most favorably to the position asserted by the moving parties.

The Court: The affidavits go, I think, to prove the falsity of the oath of the plaintiff.

165 Mr. Watt: I realize that is the contention which apparently Mr. Block urged in his motion to strike the affidavits. I have not heard him express the specific respects in which the affidavits indicate the falsity of the verification.

There is a statement in here to the effect that the affidavits are deficient in that they do not state matters with regard to Mrs. Surowitz' knowledge. Well, I suppose that is a semantic and I would say almost a philosophical problem.

The Court: It goes beyond mere semantics. Here you tell me in one breath that his wife, Brilliant's wife, who is a stockholder, did not execute the complaint because she was sick. Yet he was willing to put his mother-in-law in who was something approaching illiterate, or at least, to borrow your expression, a person of limited education. I think it is rather important to have that in the record, more especially since Mr. Brilliant was a man of legal education.

Mr. Watt: Turning to the question as to whether the affidavits are in some respect deficient because they
166 do not indicate what Mrs. Surowitz knew on the date that she executed the verification, as I started to say, this is in a sense a philosophic problem. I cannot say nor can any man what was in the mind of a particular person on a particular day on the basis of something I know. I can say what I told him, I can say what I showed him, I can say what I told him I believed, and

Colloquy

I can tell him the reasons I believed that. But what goes on in a man's mind is something I cannot assert of my knowledge. So to expect the affidavits as counsel apparently do to say on such and such a day Mrs. Surowitz knew A, B, C, D and E, is asking the impossible.

The Court: They don't say that. They take her at her word on her examination under oath that she didn't know anything about it. That is why I ordered the complaint dismissed.

. . .

- 171 Mr. Watt: Furthermore I would point out to the court that we are interested here in allegations which your Honor has described as serious and which counsel describe as serious, setting forth facts which, if true, constitute violations of provisions of the Securities Act of 1933.

The Court: Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name.

- 172 It seems to me that that would have been the simple way to do the thing properly.

Mr. Watt: I don't think—

The Court: I am not telling you how to practice law, but I suggest that as a practical matter.

Mr. Watt: I submit that a person who is ill as Mrs. Brilliant has been over a number of years has many

Transcript of Proceedings

more and legitimate reasons for not coming into court as a party plaintiff.

The Court: You weren't going to bring Mrs. Surowitz to the witness stand, were you, in support of the allegations?

Mr. Watt: There are many cases, your Honor, in which apart from a plaintiff testifying that he or she is a shareholder, the plaintiff has no facts which would be admissible as evidence in a case of this kind.

The Court: Of course that is true. We try many cases where the plaintiff doesn't testify, but where an oath is required and the plaintiff signs an oath, we expect the oath to be an honest one. I don't insist that Mrs. Surowitz would necessarily be brought to the witness stand except as she might have been called as
173 an adverse witness by the defendants.

Mr. Watt: I suggest, then, to your Honor that what that circumstance indicates is that in a case like this, the supposed purpose of Rule 23(b) which is, counsel asserts, to enable them to find out from the plaintiff himself or herself the factual basis for the suit, is clearly inapplicable for this reason: The factual basis for the suit of necessity by reason of the nature of the suit does not rely on Mrs. Surowitz's personal knowledge; it lies on the records filed—

The Court: It does if she swears she has the knowledge, sir.

Mr. Watt: With regard to the things to which she has sworn, she has knowledge.

The Court: We are very jealous of oaths that are taken in this court. I am not tolerant of this sort of thing, and if any reviewing court will tell me that the procedure here, the conduct of the plaintiff and her

Colloquy

counsel here meets the requirements of the law, I will follow what the reviewing court tells me to do. But in the face of this deposition, I can't permit this complaint to stand. I have already ruled on that. We are
174 discussing only these findings.

Mr. Watt: I understand.

* * *

177 The Court: I would have more respect for you if you would start a suit here with somebody who has a Phi Beta Kappa key as a plaintiff and let him make oath to these things instead of heaping it on his uneducated mother-in-law.

Mr. Watt: I will say this, your Honor, since I believe there is a cause of action here: I would be happy to do that, but I also believe that the court should not be closed to the poor and the ignorant, the untutored and virtual illiterate.

The Court: Now did I say I was closing it?

178 Mr. Watt: And I think the virtual effect of this—

The Court: Did I say I was closing the court to the poor who employ two law firms to represent her, your firm and the Alzheimer firm? Does that sound like we are closing the door to the poor?

There is no allegation here in the complaint that the plaintiff is poor.

Mr. Watt: The word poor was brought into this matter originally by Mr. Block in describing the plaintiff at one point, but let me return to what I have to say, Your Honor, because then I am sure I have said everything that I can say and I appreciate the opportunity to develop my points fully.

* * *

ADDITIONAL APPENDIX.

Excerpts from Transcript of Proceedings in Trial Court (supplementing excerpts in Supplemental Appendix to Brief of Individual Defendants).

Hearing on February 26, 1964:

Mr. Block:

7 Now, your Honor, on direct examination after intermission, there were some questions and answers put to Mrs. Surowitz and that direct examination came after an intermission of some 15 or 20 minutes. I asked Mrs. Surowitz the following question at page 34, at the bottom of the page:

“Q. At that time—”

—which is the time during the intermission—

“—isn't it correct that they told you that they would ask you these questions about your discussions with Mr. Brilliant?”

“A. —”

The Court: Who is Mr. Brilliant?

Mr. Block: Mr. Brilliant, your Honor, is the man that the witness testified was her son-in-law for nine years. She didn't know what he did, although he had been her son-in-law for nine years. But he was the man that brought
8 this complaint to her and she signed.

If there is anything, your Honor, that I think is clear in the law it is that the people who are complaining must be those who make the complaint, not some poor innocent working woman who is brought into this court room, handed

2 *Excerpts from Transcript of Proceedings.*

a document, and told to sign it, as is perfectly clear from this.

And, your Honor, there is another additional ground for this, as I say, highly unusual motion, I think.

Mrs. Surowitz' testimony first states under oath—that is one thing she says under oath, that she is the owner and holder of stock of Hilton Hotels Corporation, and I believe that is paragraph 1 of the complaint here. Her testimony is that she bought the stock in 1957, but she doesn't remember anything about it. What she says is:

“I can't tell you. I don't remember.”

This is page 6.

9 “I really don't know. I gave money, I gave him the money, and he invested it, but how he bought it or what he bought, I don't know, I don't remember.

“When you say ‘he,’ you mean Mr. Brilliant?”

“A. Yes.”

We have overnight, your Honor gotten from the transfer agent of Hilton Hotels Corporation an affidavit which the plaintiff has not seen that the First National Bank is the transfer agent for Hilton Hotels Corporation and has been such since June 13, 1946. We have reviewed the open and closed ledgers from January 1957 to the present. Incidentally, she said she bought this stock in 1957. The records to the present indicate that Mrs. Dora Surowitz, 1299 Ocean Avenue, Brooklyn, New York, owns 100 shares of Hilton stock. Certificate 100,897, dated October 10, 1963, and that said Dora Surowitz has been a stockholder of record since October 10, 1963.

Now, your Honor, this complaint is one which speaks of wrongs done in 1962 and January 1963. We are not making this motion because Mrs. Surowitz doesn't know every single one of the allegations of the complaint.

10 We make this motion because it is clearly a sham plead-

ing and this Court has inherent jurisdiction to strike a sham pleading. We make it also on the grounds, your Honor, that Mrs. Surowitz does not come before this Court as a proper stockholding party plaintiff.

Thank you.

* * * *

11 The Court: Who represents the plaintiff?

Mr. Watt: I do, your Honor.

First, your Honor, let me indicate we received notice of this motion—

The Court: Will you please identify yourself for the record?

Mr. Watt: I am sorry.

Mr. Watt.

We received notice of this motion about 3:30 yesterday afternoon. I think, as Mr. Block correctly states, it is an unusual type of motion. It is obviously not a motion which is one which is granted as a matter of course. We contest it.

The Court: I might say I have allowed motions of this kind before.

Mr. Watt: I understand, but I don't think it is a motion of course. I think it is a contested motion.

The Court: I will let you take all day to reply. Of course the words "of course," as to its being routine,
12 we dismiss cases here right along.

Mr. Watt: All I could say is what Mr. Block characterizes it as unusual, I think that indicates that it is not routine.

* * * *

15 The Court: Did you attend at the deposition?

Mr. Watt: I attended at the deposition, yes, sir. Yesterday evening I was working on another matter. As a matter of fact, I was getting ready for a deposition which

4 *Excerpts from Transcript of Proceedings.*

was scheduled for 10:00 o'clock this morning. We think we are entitled to file affidavits in opposition to the motions, particularly since the parties defendant have filed an affidavit or asked leave to file an affidavit.

Mr. Block: We haven't asked leave. You are quite wrong. We merely called the attention of the Court to this as a supplemental matter. That is not before the Court. We will rest upon the shamness of this pleading.

Mr. Watt: Then I point out another thing: As far as the deposition is concerned, I don't know whether it has been formally filed or not. As of yesterday when the deposition was taken, we did not waive signature. We have not had an opportunity to review it in the detail in which I think we are entitled to, and to research the law in this matter, which I think we are entitled to, and come into this Court and argue before the Court the issues placed before it by the defendants' motion. We are asking that opportunity at this time.

I frankly say the basis of this point is that of 3:30 yesterday afternoon we received notice and we are not prepared to argue the issues as I believe they should be argued, and which your Honor has said are serious issues. We would like to argue seriously. We would like an opportunity in advance of that occasion to file an affidavit or affidavits in opposition to the motion which I believe we are entitled to do.

* * * *

17 Mr. Watt: We would like 15 days within which to file opposing affidavits, your Honor, and we will be ready at an appropriate date thereafter to present argument if your Honor wishes it done on the basis of oral argument. We will be prepared.

The Court: How do you know you will be prepared to present argument? I am interested in you as a lawyer and your associates here in this kind of a case—when I see a

thing like this, as this appears to be—and I don't prejudge your client; you represent an out of town client and sometimes a local attorney doesn't have knowledge of the facts which he would have if his client lived here—but you say you will be prepared to argue it. I am just interested in knowing what your argument is going to be in view of what appears to be an accurate transcript here. You 18 concede its authenticity, do you not?

Mr. Watt: Initially I have indicated, your Honor, that I do not question the accuracy of your very competent court reporter, but that it is different from studying a transcript with care. It is different from having an opportunity to review it in association with my colleagues, and it is different from having an opportunity to research the law. There are, I believe, cases in matters similar to this which I believe we are entitled to look to. To ask me to indicate to you—

The Court: Oh, I am not going to—

Mr. Watt: —now what my argument will be is—

The Court: Oh, I am going to give you the time. I think you should recognize that this is an extraordinary or appears to be an extraordinary situation, and I think we should be mindful of that.

Mr. Watt: If your Honor is suggesting I am not going to be prepared to argue seriously, I certainly am going to be prepared to argue seriously. I think in view of the fact that our client is out of the city, and in view of the fact that—

The Court: Wasn't she here yesterday?

Mr. Watt: She was here yesterday. She has re-
19 turned to New York.

The Court: Fifteen days to the plaintiff.

* * * *

6 *Excerpts from Transcript of Proceedings.*

Hearing on March 23, 1964:

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10 Mr. Block: Yes, your Honor. Your Honor gave us leave to file that at the original hearing.

The Court: Do you and other counsel for the defendants or you alone intend to offer the deposition as evidence in support of your motion? And let me tell you the reason for asking the question: Suppose I conclude that there has not been compliance with Rule 23, with the provisions of Rule 23(b) of the Federal Rules of Civil Procedure; still evidence of the failure of the plaintiff to comply would be contained in that deposition.

Mr. Block: That is correct, your Honor.

The Court: For the complaint on its face says that she believed everything in the complaint other than those matters which are stated to be on information and belief.

Now, what is the intention?

Mr. Block: It is, your Honor, to file that deposition, and I hope that our motion—

11 The Court: Mere filing the deposition under the rule, it seems to me, unless I am mistaken about it—you point it out to me—but the mere filing doesn't bring the testimony officially before the court. All the filing does is to give the parties the right to use the deposition on the trial. Isn't that your motion?

Mr. Block: Well, your Honor, I think that in the case of a motion such as this, it is the same as the affidavits which have been filed by Mr. Rockler and by Mr. Brilliant. They are now part of the motion.

The only question that I thought was raised before your Honor at the first hearing on our motion was that Mr. Watt said he had not had an opportunity to study the questions and answers and was going to raise any questions of inaccuracy, I thought, at the time he filed his affidavit.

The Court: I know that in considering motions for summary judgment, the court may take into consideration all of the depositions on file affidavits and any other 12 documents properly filed. As I went through these papers, I wondered whether on the motion to dismiss—and your primary motion here is one to dismiss—I had a right to take into consideration the deposition of the plaintiff which has been filed of record but not introduced as evidence.

Mr. Block: We would introduce it, then, at this time. As I say, your Honor, I understood that at the time we presented this motion to your Honor—

Mr. Hodson: Page 19, Mr. Block.

Mr. Block: Thank you.

I said at page 19 I would ask leave of court to file the deposition.

“I would ask leave of court to file the deposition of Dora Surowitz subject to whatever corrections Mr. Watt feels should be made after checking with the court reporter’s actual notes.

“The Court: The clerk is directed to file the deposition of the plaintiff.”

At this time, your Honor, then I would make a formal request to have the deposition of Dora Surowitz made a part of the record on our motion as evidence.

The Court: You offer it in evidence?

Mr. Block: Yes.

The Court: Then I suggest that it be marked as—Whom do you represent, the defendant Crown?

Mr. Block: Mr. Crown.

The Court: Mark it as Defendant Crown Exhibit 1 for identification.

Do you join in that?

Mr. Friedman: I join in that motion.

Mr. Hodson: I join in it, too, your Honor.

8 *Excerpts from Transcript of Proceedings.*

The Court: Then let it be marked as Defendants' Exhibit 1 for identification.

(Said document was thereupon marked Defendants' Exhibit 1 for identification.)

The Court: Counsel for the plaintiff, is there any objection?

Mr. Watt: There is no objection, your Honor.

The Court: All right. With no objection then, Defendants' Exhibit 1 for identification may be admitted into evidence as Defendants' Exhibit 1.

(Said document, so offered and received in evidence, 14 was marked DEFENDANTS' EXHIBIT 1.)

Mr. Block: Thank you, your Honor.

The deposition of Mrs. Surowitz establishes that the oath is a false oath. I feel only a sense of sorrow in having to say that because I think as the court reads the deposition, and particularly reads the affidavit of Mr. Brilliant, the court will come to the conclusion that this woman was imposed upon. But that does not make any the less grievous, I believe, your Honor, the injustice that has been committed by permitting her to file that false oath. The cases are clear that a palpably false pleading may be stricken, and we suggest that equally a pleading which must be sworn to may be stricken when the oath which necessarily supports it pursuant to the rules is palpably false. The courts have gone so far as to strike defenses where they are palpably false as in a conspiracy case where a group of defendants who are being sued in a civil conspiracy case deny a conspiracy of which they have been convicted criminally and the courts have stricken 15 that denial as palpably false. That is the case of *United States v. Greater New York Chamber of Commerce*, which was affirmed at 219 U. S. 293.

There are cases, your Honor, which establish the difference between a plaintiff who has knowledge of his claim

and is subject to being examined on that knowledge but doesn't have knowledge of absolutely every detail of the claim and a plaintiff who is induced by attorneys to file a claim without any knowledge. And it is interesting that the two cases which point up this difference so clearly both involved the same situation and are both found in the same volume of the Federal Rules Decisions. The first of those cases is *Murchison v. Kirby*, 27 Federal Rules Decisions at page 14. In that case the defendants moved to strike a complaint or to dismiss a complaint after they had taken 1800 pages of testimony of Mr. Murchison and they moved on the ground that Mr. Murchison didn't know every detail of his complaint. The court said:

“Obviously the facts to support the complaint, particularly the conspiracy count, may come from sources other than the plaintiff.”

But the plaintiff, we submit, your Honor, must know those sources and have an understanding of the suit.

And in *Freeman v. Kirby*, 27 Federal Rules Decisions at 395, the court dismissed that complaint involving the same situation where an attorney—now this was a case where an attorney had signed the complaint and the court said that the attorney had no knowledge. At pages 398 and 399 of 27 Federal Rules Decisions the court said:

“It is apparent that Holland, the attorney, in his eagerness to be of service, expressed a desire to bring this suit even before he had received Court's Exhibit I which was the alleged source of his grounds to support the allegations of the complaint. He apparently felt so offended that he instituted suit in the names of persons whom he had not previously met and allegedly expended approximately \$12,000 in disbursements without any definitive agreement with his client to be made whole. He neither knew who had offered the memorandum or inquired into the truth of the

allegations therein, nor as to matters stated therein to be further developed. If an attorney's signature to a pleading is to be more than a hollow gesture, he must do more than obtain a person willing to lend his name as a plaintiff, especially so where, as here, the complacent plaintiff is without knowledge, is content to act that role without reading the complaint, and expects to be paid for his time. An attorney's certification under such circumstances runs flagrantly afoul of the purpose of the rule."

The Court: You may remember one of your partners was in a case here not unlike the one you just quoted. It dealt with the proposed merger of General Dynamic Corporation with Materials Service Company where some lawyer in New York, I believe it was, or some place in New
18 Jersey selected a Chicago lawyer to file a complaint also on behalf of a woman with a nominal stockholding seeking to induce the court to restrain the merger. And your partner, whoever it was, took the deposition of the lawyer who himself made oath to the complaint, and his deposition was taken because in that case the woman was asserted to be sick, couldn't attend. He admitted under oath that he didn't know his client, that the facts or the allegations to which he had sworn as being true he knew nothing about except as his referring lawyer in New York or Philadelphia, I have forgotten the name of the town, told him they were true.

I dismissed that complaint on the motion of the defendant. An appeal was taken, I think, in that case to our Court of Appeals, but my recollection is—and I am not sure about this—that it was not expeditiously prosecuted, and it was later dismissed.

So we do not have in this circuit an expression by our Court of Appeals precisely on the point. I don't know why

it wasn't prosecuted, but after notice of appeal, I don't think any briefs were filed.

Mr. Block: That is correct, your Honor.

The Court: You are familiar with it?

Mr. Block: Yes, I am. That was Hennessy *vs.* Material Service Corporation.

The Court: You may continue.

Mr. Block: Well, your Honor, as grievous as is the situation where an attorney makes that kind of representation, I feel that even more grievous is the situation here where they have had a totally false affidavit attached to a complaint by this poor and innocent woman, and we get to the point, remarkably enough, of reading in both the affidavit of Mr. Rockler and in the affidavit of Mr. Brilliant which are now made part of this record, that Mr. Brilliant really represents over 2,000 shares of stock of Hilton Hotel and the question immediately arises, "Now why would they pick this poor woman who has no knowledge of anything, this, as they say, uneducated Jewish lady who came from Poland or some Central European country without education other than in Jewish schools and have her make this oath when Mr. Brilliant, who is a graduate of the Harvard Law School, who sent a proxy to the meeting of Hilton Hotels Corporation in 1963 in his name—he didn't

send that proxy in Mrs. Surowitz' name; he sent that proxy in the name of Irving Brilliant as Trustee—why didn't Mr. Brilliant, who under oath says he represents 2,235 shares, I believe? Why didn't Mr. Brilliant sign this affidavit if it is true that on information and belief he believes these things and that all of these charges that they made as the truth are in fact the truth?

The Court: Well, we must take the complaint as filed. I wonder whether I have any right to inquire into the reasons why the affiant Brilliant didn't make himself a complaint? Certainly if I were trying this case, it would

12 *Excerpts from Transcript of Proceedings.*

become material, but considering the matter on the motions here, I wonder if I have the right to do that?

Mr. Block: I would suggest that, your Honor, only because Mr. Brilliant has filed this affidavit. In other words, trying to sustain a false affidavit, Mr. Brilliant has filed an affidavit which merely emphasizes its falsity. That is
21 why I suggest to this court that it has the right to consider Mr. Brilliant's affidavit.

We did not make it part of this record. Mr. Rockler and Mr. Watt filed it pursuant to their request for fifteen days within which to file affidavits.

But what I point out to this court is that they do not make any affidavits which indicate that Mrs. Surowitz' deposition—I mean Mrs. Surowitz' affidavit is true, but what they do, they file affidavits which seem to suggest that they didn't want to file an affidavit by some responsible and understanding person.

Mr. Brilliant's explanation for the reasons for not signing this himself are, I think, somewhat significant. He says:

“Mrs. Surowitz stated that she was willing to bring suit and I advised Mr. Rockler of this.”

This is at page 5 of Mr. Brilliant's affidavit.

“I considered joining as a party plaintiff in my capacity as trustee for my minor children or as the person
22 responsible for handling my mother's estate. I also considered and discussed the matter with my wife as to the advisability of my wife joining as the plaintiff. My wife is and has been quite seriously ill for the past seven years and has spent an average of about eight weeks a year in the hospital. Consequently we concluded that she ought not to be named as a party plaintiff. I also determined that I should not sue in a fiduciary capacity because of possible legal complications that might be entailed. Before reaching these con-

clusions, I discussed the facts and circumstances with Mr. Rockler. Later Mr. Rockler sent the formal complaint to me, I read and explained it to Mrs. Surowitz, I told her that the charges in the complaint reflected the investigation and study of Mr. Rockler and myself, and that in my opinion the charges of wrongdoing were soundly based."

23 Now here is the man who says, "I represented 2,235 shares, but I am not going to sign this. I am going to let this poor old lady sign it. But I talked to Mr. Rockler about it and told him that in my opinion the charges of wrongdoing were soundly based."

When Mr. Rockler files an affidavit, he goes through the whole story about how he was approached by Mr. Brilliant and how he sent this document down to be signed. He never says—and I think that this is something for which Mr. Rockler should be complimented—all he says about the signature on this affidavit is:

"Within a few days after the complaint had been mailed to Mr. Brilliant and Mrs. Surowitz, it was returned to affiant with verification executed."

And that is the end.

But he says:

"Counsel and the plaintiff do not in any respect agree to waive and expressly reserve the attorney-client privilege and the confidential and privileged
24 character of counsel's work products."

The Court: I do not have a clear recollection, it is some time since I looked at this complaint, what compliance in your opinion has been made with this requirement of Rule 23(b), and I quote from it:

"The complaint shall also set forth with particu-

25 larity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for the failure to obtain such action or the reasons for not making such effort."

Mr. Block: There is an attempt to meet the phrase, "the reasons for not attempting to take such action," in paragraph 10 at page 41 of the complaint.

“No demand has been made on defendant corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances pleaded above. The affairs of the defendant corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved and implemented the above-described illegal and fraudulent scheme, fraud and deceptive acts and practices employed to defraud the defendant corporation and its shareholders. Plaintiff has heretofore protested to the defendant corporation against the gross impropriety of the acts set forth above.”

27 The Court: That allegation, of course, is palpably false in the light of her sworn testimony.

40 The Court: Richard F. Watt. That is your signature, isn't it, on the complaint?

Mr. Watt: It certainly is, your Honor.

The Court: And then follows the signature of Walter J. Rockler, is that right?

Mr. Watt: That is correct.

The Court: And David R. Kentoff, attorneys for the plaintiff.

May I inquire whether you prepared this complaint?

Mr. Watt: I worked on the complaint, your Honor. I have been working on the matter in conjunction with Mr. Rockler for many, many months.

The Court: Lawyers would say that your answer is not responsive. I ask you, since your signature is on this complaint, you have attached your professional signature to this complaint, and I feel that a lawyer should be
41 very jealous of his professional signature. As a matter of fact, reading some of the—I was going to say legislative history, but the history of the discussions that went on in connection with the framing of these rules, some of the men said in answer to those who said every complaint ought to be sworn to that the mere signature, the professional signature of a lawyer—and I have been contending for this for years—ought to carry with it a great deal of responsibility.

I had occasion to make a speech, and I don't make many—in Indianapolis at the Seventh Circuit Judicial Conference when we were considering the amendments to the civil and criminal rules. I spoke of this Rule 11 and I said I was getting weary, as I am sure many trial judges were, of having lawyers put their professional signatures to allegations, serious allegations in a complaint, and the allegations in this complaint are very serious; that some way ought to be found to insure that the lawyer who puts his professional signature to a complaint honestly believes,
42 based on talks with his client, if you please, that the allegations are true.

Now I ask you again: Did you prepare this complaint?

Mr. Watt: No one individual prepared the complaint in the sense that—

The Court: What part of it did you prepare?

Mr. Watt: I would have to—

16 *Excerpts from Transcript of Proceedings.*

The Court: Your signature is first on the complaint and it has 92 pages.

Mr. Watt: Your Honor, the complaint went through a number of drafts in our office. I worked on it, Mr. Kentoff worked on it, Mr. Rockler worked on it.

The Court: You are unable to tell me whose language is contained in this complaint?

Mr. Watt: I would say all three of our language is contained in the complaint, your Honor.

The Court: You say that you, Mr. Rockler and Mr. Kentoff—was that the name of the lawyer?

Mr. Watt: Kentoff.

The Court: Kentoff. Is he a Chicago lawyer?

Mr. Watt: Yes, he is, sir.

The Court: All three, then. You tell me that all three of you prepared this complaint?

Mr. Watt: If your word prepared, your Honor, 43 means that all three of us prepared all of it, the answer obviously is that all three of us did not at every point in time—

The Court: You three assisted in the preparation.

Mr. Watt: The three of us assisted, worked together, collaborated in preparing the complaint.

The Court: Did any other lawyer prepare the complaint or assist in the preparation of it?

Mr. Watt: I don't think so. I think the three of us did the work, sir.

The Court: You mean to say that you, as the first signature on this complaint, do not know whether or not any other lawyer assisted in the preparation of the complaint?

I am not seeking to embarrass you.

Mr. Watt: You are not embarrassing me in the slightest.

The Court: If there is anything here that is going to take you out on this thing, I want to do it.

Mr. Watt: I am not in the slightest bit embarrassed.

The Court: This is my 48th year at the bar and I
44 don't like to be critical of lawyers. To paraphrase an
expression, some of my best friends are lawyers. I
might go further and say virtually all of my friends are
lawyers. I don't ever like to say a hurtful thing to a
lawyer, but I think a lawyer whose name appears first on
this complaint in his own handwriting, in the light of the
deposition of the plaintiff, ought to be able to tell me who
prepared the complaint, because the signature is there.
The judges have a right to know that the signature on a
complaint represents that those are the lawyers who pre-
pared it.

Now you are unable to say—

Mr. Watt: No, I am not unable to say, your Honor.
I have advised you that I, Mr. Rockler and Mr. Kentoff
collaborated in preparing the complaint.

The Court: Any other lawyers?

Mr. Watt: Whether there were other lawyers in our
office who from time to time were conferred with and spoken
to, at this point I would not be able to say.

The Court: Will you tell me that the dictation of this
complaint was by you and Mr. Rockler and Mr. Kentoff
45 and not by your referring lawyer?

Mr. Watt: It was not done by any lawyer except—
lawyer or lawyers except in our office, your Honor.

The Court: To what extent did you rely on information
furnished you by your referring lawyer—for example, Mr.
Brilliant, whose affidavit is here?

Mr. Watt: Information was transmitted back and forth
between Mr. Brilliant and Mr. Rockler, as their affidavits
made clear, and we relied on that information to some ex-
tent as the affidavits made clear.

The Court: Did you ever meet your client before you
prepared this complaint?

18 *Excerpts from Transcript of Proceedings.*

Mr. Watt: I did not, sir.

The Court: Did any of your partners or associates ever meet your client before you prepared this complaint?

Mr. Watt: I don't know whether Mr. Rockler met Mrs. Surowitz before or after the complaint was prepared, your Honor.

The Court: Just as a matter of professional interest, do you think a lawyer ought to meet his client before he files a 92-page complaint in the United States District Court
46 making charges against men who bear fine reputations in the community, not only in this community but throughout the country? Do you think you should have talked with your client?

Mr. Watt: In some instances, I would say the answer to that is yes, your Honor. In other instances in which the lawyers do a tremendous amount of investigatory work and checking in order to ascertain the basis for the complaint, and where it is sent to us and where we are collaborating with someone out of the city, who is likewise doing some investigatory work, I would say it is not necessary, your Honor, for us to comply with the requirements of Rule 11, that we first meet with the client. This is the kind of a case in which of necessity the facts are primarily within the knowledge of the defendants, and of which no shareholder, no matter how sophisticated, how learned or how versed in the details of financial transactions, could possibly have all the knowledge.

The Court: Are you telling me when you say the facts are primarily within the knowledge of the defendants, that that is the theory and basis under which you filed
47 this complaint?

Mr. Watt: That is what the courts have repeatedly stated, your Honor, in cases arising under Rule 11, in antitrust conspiracy cases in which problems of this kind have arisen. Of necessity where you have actions taken

by corporate officers and directors, in most instances individual shareholders do not know the details of it.

The Court: How do you learn, how did you get the information to make 92 pages of allegations, some of which, as I read the complaint, may even constitute violations of the criminal features of the Securities and Exchange Acts or other statutes?

Mr. Watt: You do precisely what was done here, your Honor, a great deal of time and effort was devoted to investigation, getting as much information as was available.

The Court: You don't say—the plaintiff doesn't say here that the allegations in the complaint are the basis of an investigation by somebody in a lawyer's office or a son-in-law or a Chicago lawyer. That allegation is not made.

48 Mr. Watt: I don't think it is required that the plaintiff say what her lawyers did in a matter of this kind. The question is whether the lawyers did it, and on the basis of the affidavits that are on file here, I don't think there is any basis whatsoever for disputing the fact that an enormous amount of time and effort and investigation was devoted to the matter before the complaint was filed.

The charges are not made lightly, they are not made on the basis of a cursory investigation. A great deal of information was obtained.

The Court: You don't think it is light to have a plaintiff file a 92-page complaint in the United States District Court under oath and thereafter under oath say she doesn't know a thing about it? You don't think that is doing a thing lightly?

Mr. Watt: I was directing myself at that point, your Honor, as to what the attorneys had done in this instance, because you asked—

The Court: I ask you to answer that question.

Mr. Watt: I will be happy to answer the question.

The Court: I want it in the record, I want your conception of what you think right in those circumstances.

49 Mr. Watt: I think that a plaintiff who is a stockholder is entitled to rely upon such information as is relayed to her by someone with whom she has a close relationship and in whom she has confidence; whether that individual relates to her that he has done some investigating and has conferred with counsel, and counsel have done some investigation, and on the basis of that investigation the individual that is speaking to the plaintiff advises her that he thinks the matter is well founded and does his level best to explain to her what the facts and circumstances are—

67 Mr. Watt: If that person, however untutored, relies on what is told to her by someone in whom she has confidence, and that person tells or informs the plaintiff that, himself, or herself, has done his or her level best to ascertain facts, and relates to the plaintiff what
68 he or she has discovered, then I would say a person could be illiterate and still be justified in relying upon what was told to her, and be in a position in which she could say that she honestly believed certain things.

I do not think that we are at a point at which the courts are open or closed, depending upon whether or not a person has the degree of understanding which it is necessary for counsel to have in many instances, to understand what a complaint is all about, and I think that that is precisely what is indicated in the Murchison case. It is what is indicated in many other cases in which matters of this kind have come up, and in certain kinds of cases which are those in which the party plaintiff necessarily relies in some instances, necessarily relies almost wholly upon counsel.

And here we have an instance in which the woman is

relying not primarily upon counsel, she is relying upon someone in her own family whom she knows over a period of time, and presumably whom she could consider trustworthy and reliable.

I would say the fact that Mr. Brilliant himself owned shares of stock in two different capacities, the fact that his wife owned shares of stock, would be factors and 69 circumstances which would certainly justify Mrs. Surowitz in placing even greater weight on what Mr. Brilliant told her.

* * * * *

Hearing on March 27, 1964:

19 The Court: We are not concerned with the limited education of your client; what we are concerned with here is a lawyer filing in the United States District Court a complaint sworn to by a person who says she doesn't know anything about it, in substance.

Mr. Watt: I want to come to that subject, since it has been brought into this matter by counsel, of the role of plaintiff's attorneys in this matter again. I thought I had covered that in my earlier argument, but I will be happy to reach it again.

Finding paragraph 12 at the bottom of page 5 and the top of page 6, I really can't help but be astounded at the temerity of counsel urging that this indicates that Mrs. Surowitz was in some sense bamboozled by irresponsible and I take it what they regard as unethical counsel in this matter.

Now what is a collusive suit under Rule 23(b)? It seems to me that is the guts of the matter.

A collusive suit under Rule 23(b) is a device whereby 20 a corporation which, because if it files suit in its own name would not be able to take advantage of diversity of citizenship, enters into an arrangement with some stock-

22 *Excerpts from Transcript of Proceedings.*

holder who is friendly and willing to go along so that the stockholder brings a derivative suit in a cause of action that belongs to the corporation, and the corporation thereby has the advantage by that kind of collusion of diversity of citizenship which it could not otherwise obtain.

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21 Mr. Watt: There is no indication by any document on file in this court that as of the date she verified it she didn't understand certain things. Certain things were explained to her, the complaint was read to her, she subsequently verified it, and there can be no doubt as to those facts.

The Court: You don't think her deposition—

Mr. Watt: Her deposition indicates what was in the woman's mind as of the time her deposition was taken, and certainly not the basis where a woman indicates on question after question that is put to her in legal language that she doesn't understand, she doesn't know, I can't answer you on that—it is certainly not a justifiable conclusion from that that the woman filed something falsely as of the time she verified the complaint. What it indicates is that when she was asked certain questions orally on an oral deposition, her comprehension of those questions was extraordinarily limited.

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23 The Court: Did you object to the question?

24 Mr. Watt: I objected to some of the questions, yes.

The Court: All of them?

Mr. Watt: Not to all of them, no, sir. This was not my deposition. There were no—

The Court: You have a right to participate in it.

Mr. Watt: There were no pleadings on file. There were no motions on file at the time.

The Court: There was a complaint on file under a so-called oath. You say no pleadings were on file.

Mr. Watt: No answer or motion of any kind had been filed by the defendant.

The Court: The complaint had 90 pages. What do you call it?

I am disposed to agree with you that it was not a pleading as a matter of law, but it was a so-called pleading.

Mr. Watt: Your Honor, I don't want to get into a dispute about it.

The Court: Don't make misstatements of fact, sir, to me. You say there were no pleadings on file; there was a complaint. If there were no pleadings on file, you wouldn't be in court.

25 Mr. Watt: No pleadings filed by the defendant is what I meant to say.

The Court: Then why don't you say what you mean?

You want me to be impressed with your argument. I don't want you to make such inaccurate statements. That reflects on me to say that I am proceeding here with no pleadings on file.

Mr. Watt: I apologize for misspeaking to the court.

The Court: I accept your apology, but when you stand at that lectern and make statements like that, be careful, please be careful. You should be especially careful in a situation like this, sir.

Mr. Watt: Your Honor, I am especially careful.

The Court: No, you are not, not when you make a statement that there were no pleadings on file.

Mr. Watt: Turning to finding paragraph—Let me just interject with regard to the intervening paragraphs.

As I indicated to the court, almost every one of those
26 paragraphs has to do with questions which were asked on the basis of reading certain allegations of the complaint to the plaintiff, and in almost every instance there was indication by the plaintiff that she did not understand the question. I take it her inability—

24 *Excerpts from Transcript of Proceedings.*

The Court: I don't agree with you. She said, "I can't give it to you because I can't explain it to you and I don't know."

How does that say that she didn't understand the question?

Show me one answer in the deposition where she said, "I don't understand the question."

Mr. Watt: "Question: —" page 8—

"Can you tell us, Mrs. Surowitz, why you did not tender your shares of stock pursuant to the offer which is attached to your complaint?

"A. I don't know. Can you explain to me what you mean? I don't understand what you are talking about.

"Q. Did you understand that there was a solicitation for tender of Hilton Hotels Corporation stock
27 made by Hilton Hotels Corporation?

"A. What does it mean, tender? I don't understand the word."

Finding paragraph 24, the last sentence:

"On advice of counsel she refused to answer any further questions concerning the existence or nature of any arrangements for the payment of legal fees or disbursements in the litigation."

It is quite true I did advise her not to answer. On the basis of my advice, she did not answer. I don't know what significance that has in this matter.

I might say that in giving the advice to my client, I relied upon a decision of your Honor, *Foremost Products, Inc. vs. Pabst Brewing Company*, 15 Rules Decisions 128, which is a 1953 ruling of your Honor's in an antitrust case in which an effort was made by defendant's counsel to question the plaintiff with regard to fee arrangements and all of the discussions between plaintiff and his counsel leading to the filing of the suit.

28 Perhaps that does not now represent the law, I don't know. I regarded it as a proper decision and I acted on the basis of that.

I don't know why there should be now in the findings here something presumably from which an unfavorable inference is to be drawn.

The Court: Are you suggesting that the court omit from findings what really happened? I filed just a matter of a half hour ago a 90-page memorandum in a case. Some of the findings were favorable and some weren't, but I was obligated to make findings.

Mr. Watt: I quite agree, your Honor, but I think the findings must be relevant and germane to the matter before the court. The matter before the court as now phrased by counsel is a motion to dismiss as sham and for filing a false verification. I am at a loss to understand what the matter that I just read to your Honor has to do with either of those motions.

Finding paragraph 28, at the top of page 12.

29 "At no time did she attempt to state in even the most simple or rudimentary terms the nature of her grievances or the charges made in the complaint."

She indicated as best she could she had a grievance. She said her stock wasn't right and she indicated the dividends had stopped. I submit to you about 99 per cent of shareholders of American corporations held publicly, if their dividends stop, they will have a feeling there is something wrong, particularly if they have been getting dividends over a period of years. I don't think they thereafter have to be able to explain why it stopped or what the internal ramifications of the corporation's activities are so that the plaintiff would understand it. She had a grievance, and her grievance was that certain action had been taken by the corporation. She wrote a letter concerning it. Later the

26 *Excerpts from Transcript of Proceedings.*

dividends stopped. I don't think that the plaintiff stockholder has to understand a great deal more than that.

Finding paragraph 29 of the findings of fact:

30 "The failure of Mrs. Surowitz on her deposition to supply any information whatever about the nature of the charges in the complaint or about the basis for her sworn statement that these charges were true or correct or that she believed them to be true and correct was not caused by the use of technical or legal language in the questions or by her failure to understand what was being asked."

I submit that anybody who sat in that deposition and anybody who reads that deposition must come to the conclusion that the woman in many instances simply did not comprehend.

The Court: On the contrary, I think that—you say "anyone." Please don't include me. I think the logical inference is just what that finding asserts.

Mr. Watt: I certainly dispute that we have, in effect, conceded the truth of that finding by the matters that are set out in the sentence beginning in the middle of paragraph 29.

"Plaintiff's counsel, having in effect conceded the
31 truth of the finding—"

I don't concede the propriety of proof of the finding in any respect, and I don't think that anything I have done either in the deposition or subsequently can fairly be interpreted as such concession.

• • • • •
35 Mr. Watt: Furthermore, the affidavits are criticized in finding paragraph 31 because there is nothing set forth with regard to the arrangements concerning the contemplated payment of legal fees and disbursements in

connection with this litigation. There was no motion
36 or matter pending to which that was at all germane.

There was a motion to dismiss as sham. That is a Rule 11 motion. There was a motion to dismiss on the ground she was not a proper party plaintiff. Those were the matters that were pending before the court.

However, counsel now wishes to interpret them. Those were the matters that were filed and were noticed.

The Court: Does that refer to the omission of the plaintiff to comply with the local rule of court?

Mr. Watt: Finding paragraph 31 indicates that the affidavits said nothing or contained no other statements concerning the arrangements concerning the contemplated payment of legal fees and disbursements in connection with this litigation. My response to that is that with regard to the pending motions, there was no requirement that either affidavit say anything with regard to legal fees in this matter.

The Court: Was there a statement filed to comply with that rule?

Mr. Watt: There most certainly was, your Honor,
37 and that is one of the reasons that I object to finding paragraph 35.

The affidavit of Mr. Brilliant discloses that the cost of the action is to be shared by others than plaintiff pursuant to a reasonable understanding. I think that is not again an accurate paraphrase of what Mr. Brilliant's affidavit states.

Passing that, it goes on to say—

The Court: Excuse me, counsel.

Do you have the file, Mr. Clerk?

The Clerk: Yes, your Honor.

(Whereupon the file was handed to the court.)

The Court: I just wanted to read the affidavit of counsel for compliance with Rule 39. I have read it.

28 *Excerpts from Transcript of Proceedings.*

Mr. Watt: The last sentence of finding paragraph 35 says:

“No disclosure of such understanding appears in the exception to the affidavit filed herein pursuant to the requirements of Rule 39 of the Rules of the District Court,”

38 and so forth.

Mr. Brilliant's affidavit, paragraph 10, says:

“I told Mrs. Surowitz that there would be expenses involved in suing and that since members of the family owned a substantial amount of Hilton stock, it was reasonable to assume that members of the family would be willing to pay a major part of the expenses.”

I don't know on the basis of that how it is possible to conclude that there has been a failure to comply with Rule 39 of the rules of this court.

Turning to the conclusions of law, Conclusion 2-A is a conclusion that, in fact, she had no knowledge whatever concerning the allegations of the complaint. I don't see how it is possible to make that conclusion.

The Court: Oh, counsel, I can't believe that a person of your seeming intelligence could say that to me, that you can't see that after reading this deposition. I 39 would think you were not quite that obtuse. You can't mean that.

Mr. Watt: I most certainly do, your Honor.

The Court: You just can't mean that after reading this deposition.

Go ahead.

Mr. Watt: Conclusion paragraph 2-C, I don't think it is possible to reach that conclusion. It is possible to conclude that the information she had was extremely—was not of her own in its origin, that it was transmitted to her by the people, and that she received certain facts from her

son-in-law, and that perhaps she didn't perfectly understand them, that I grant you, but to say that she had no information is to make a finding that Mr. Brilliant's affidavit in which he asserts that he explained certain matters to her is untrue, I don't think on the basis of the record it is possible to conclude that.

Conclusion paragraph 4:

"The purpose of the verification required under Rule 23(b) is to permit defendants to examine plaintiff concerning the factual basis upon which the allegations of the complaint are made before defendants are required to proceed with the extremely costly and burdensome task of discovery in such complex cases."

I submit that is not the purpose of Rule 23, and I don't think there has been any authority cited which would indicate that that is the purpose of Rule 23.

Furthermore I would point out to the court that we are interested here in allegations which your Honor has described as serious and which counsel describe as serious, setting forth facts which, if true, constitute violations of provisions of the Securities Act of 1933.

The Court: Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

48 Mr. Hodson: If the Court please, may I answer the last remark first that Mr. Watt made?

As far as I am concerned, I am sure the court knows my position in this. I represent the corporation. I
49 have always understood and I have researched the law recently on the problem, and I can cite Mr. Watt one case—I can't give him the citation at the moment now—where it is the duty of the attorney representing the corporation to file a motion to strike any sham pleading in a derivative suit of this nature.

30 *Excerpts from Transcript of Proceedings.*

Now so far as I am concerned, I have gone through these findings of fact, I have worked over them, I think they are right. There may have been one or two slight words that could be changed, but so far as I am concerned, with a false oath, your Honor, with a false oath on this, this is a sham pleading, and as far as Mr. Watt's statements are concerned, it seems to me that the main thrust of his statements are that these were legal questions. Well, they weren't legal questions at all; they were quotations from the complaint. The plaintiff was asked if she knew anything about them and she said she didn't know anything about them, she didn't understand them. Now why in the world the corporation should be put in a position of retaining counsel, hiring counsel to investigate all of these matters, take all the time, as I said to your Honor the other day, take all of the time of discovery, looking into the corporation's records to see whether this sham pleading states any real basis or has any real basis or not, I fail to see. I think I would fail in my duty if I had not joined in this motion for the corporation.

Thank you, your Honor.

* * * * *

52 The Court: I would ask this question of you, Mr. Block.

Paragraph 30, page 2, reads in part as follows:

“The complaint makes a number of extremely serious charges against all of the directors and certain officers of the Hilton Hotels Corporation, many of whom are men of national reputation and standing in
53 the business community.”

Now that is true, I think, nevertheless, there was no evidence of that, and I don't want—since I have been admonished here by counsel for the plaintiff that I am going to be disciplined in some form or other later to have any reviewing court say that I made a finding here that is not

borne out by the evidence. Anyone who keeps abreast of business in this community and in the country generally knows that many of the defendants named here are men of national reputation and standing in the business community, but there was no evidence of that, and I would like to suggest that that be deleted. I am sure your clients won't take offense and you can tell them that I believe it but I can't find it.

And I would like to say that instead of—I know you are going away, but instead of making any interlineations here by hand, I would suggest that you have one of your associates make those minor changes, the one suggested by you and the one suggested by other counsel, and bring them in here Monday morning or sometime during
54 the day Monday and I will sign them.

Mr. Block: I will do that.

The Court: I will return the original and the carbon to you.

Mr. Block: Thank you, your Honor.

Mr. Watt: Just one very minor matter so that I know we have a complete record. The copy of the deposition of Mrs. Surowitz which your Honor gave counsel leave to file in this case and which was filed, I don't know whether it—

The Court: Say that over again.

Mr. Watt: The copy of the deposition of Mrs. Surowitz which has been filed here, I don't know whether that copy has appended to it the letter that Mrs. Surowitz signed dated January 22nd, 1963. I think in order that we have a complete record, either it should be filed in conjunction with that deposition or counsel should file a copy so that it will be part of the court record because it was identified as an exhibit at the deposition.

The Court: My ruling was based on what was argued on and introduced here at the hearing. If there can be a

32 *Excerpts from Transcript of Proceedings.*

55 stipulation nunc pro tunc as of the time we heard this matter that some document be introduced, that will be all right with me. I don't know about the document to which you refer.

Mr. Block: I would like to know exactly what we are talking about, your Honor. Perhaps we can talk about it.

The Court: If you don't know, I certainly don't know.

Mr. Watt: This is my understanding as to the document that was identified.

Mr. Block: What you want is the document which was identified admitted in evidence here as Exhibit No. 1 to include the addition of this as part of that deposition?

Mr. Watt: That is correct.

Mr. Block: I would have no objection to that, none at all, your Honor. I think we have now had Mrs. Brackenbury file the signed copy of the deposition as part of the total court record and this is part of that deposition, so that if Mr. Watt wants to add it—

The Court: That document then may by agreement be appended to Defendants' Exhibit 1.

* * * * *

[fol. 221]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1964

January Session, 1965

No. 14653

DORA SUROWITZ, individually and on behalf of all other
similarly situated shareholders of HILTON HOTELS COR-
PORATION, Plaintiff-Appellant,

v.

HILTON HOTELS CORPORATION, a corporation, CONRAD N.
HILTON, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL
ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO
M. BECHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH,
LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS,
VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L.
FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON
HILTON and HILTON CREDIT CORPORATION, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

OPINION—March 11, 1965

Before Castle, Acting Chief Judge, Swygert, Circuit
Judge, and Mercer, District Judge.

[fol. 222] MERCER, District Judge. Plaintiff, Dora Suro-
witz, prosecutes this appeal to review an order of the court
below dismissing her complaint in a stockholder's deriva-
tive suit.¹

¹ Our reasons for this conclusory statement in spite of the fact
that eight counts of the complaint are based upon the federal secu-
rities statutes are hereinafter analyzed.

Plaintiff, the owner of 100 shares of the capital stock of defendant, Hilton Hotels Corporation, filed this suit on behalf of herself and all other shareholders similarly situated praying certain relief against the individual defendants as hereinafter delineated. The defendants named in the complaint are Hilton Hotels Corporation, Hilton Credit Corporation, and certain individuals who are officers and directors of Hilton Hotels.

The complaint charged that the individual defendants had defrauded Hilton Hotels of large sums of money in violation of their fiduciary obligations under state law and in violation of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Such fraudulent acts are alleged to have been done through two transactions. In the first of those transactions it is alleged that the individual defendants, as the officers and directors of Hilton Hotels, caused that corporation to offer to purchase and to purchase 300,000 shares of its own common stock at inflated prices. It is further alleged that over 100,000 of such shares were sold to the corporation by various officers and directors of the corporation.² The second transaction alleged is that the individual defendants, as officers and directors of Hilton Hotels, had caused that corporation to offer to purchase and to purchase approximately 1,058,000 shares of Hilton Credit Stock, including over 631,000 shares held by various officers and directors of the Hotels corporation, also at inflated prices.³ The complaint further charged that Hilton Hotels thus was caused to [fol. 223] expend approximately \$12,000,000 of which ap-

² Officers and directors who are alleged to have sold such stock and the respective numbers of shares allegedly sold by each are: Conrad N. Hilton, 85,847; Sam D. Young, 353; Vernon Herndon, 1,147; Herbert C. Blunck, 393; Charles L. Fletcher, 4,100; Robert A. Groves, 6,000; and Joseph A. Harper, 2,150.

³ Officers and directors of Hilton Hotels alleged to have sold such stock and the respective numbers of shares allegedly sold are: Conrad N. Hilton, 375,967; Conrad N. Hilton Foundation, 28,334; Barron Hilton, 126,392; Henry Crown, 70,631; Charles L. Fletcher, 24,100; Robert P. Williford, 14,150; Vernon Herndon, 4,408; and Robert J. Caverly, 464.

proximately \$4,800,000 was paid to certain of the officers and directors who are named as defendants.

The theory of the complaint is that the two stock purchase transactions above described had no proper corporate purpose, but that the same were intended by the individual defendants to enable certain of their number, particularly the defendants, Conrad N. Hilton and Henry Crown, and members of the families of those defendants, to sell shares of their stock to the corporation at a higher price than they could have obtained on the market.⁴ It further alleged that the individual defendants made or caused to be made numerous false and misleading statements, in that they failed to disclose relevant information to the shareholders of Hilton Hotels related to their own activities in the furtherance of the alleged scheme. It is further alleged that those acts were done at a time when the individual defendants knew, or had reason to know, that the business affairs of Hilton Hotels were in such condition that a substantial drop in the value of the shares of that corporation was imminent.

All letters of transmittal, notices and offers submitted to the shareholders in the two transactions are attached to the complaint as exhibits.

The complaint alleged that the individual defendants, in presenting the offers to purchase the stock above mentioned, concealed from the Corporation and the shareholders thereof the true reasons for making the offers, and that, with respect to both the purchase of the Hilton Hotels shares and the Hilton Credit shares, the individual defendants failed to disclose to the Hotels Corporation and its shareholders that they, the individual defendants, had engaged in activities designed artificially to inflate prices of the subject shares for the purpose of their scheme and plan to profit at the expense of the Hotels Corporation.

⁴ The complaint alleged that the individual defendants engaged in manipulative practices which resulted in artificially inflating the market prices of both Hilton Hotels and Hilton Credit shares immediately preceding their issuance of the corporation's offers to purchase such shares.

The complaint was in eleven counts, the first six of which were based upon the transaction for the purchase of the [fol. 224] Hilton Hotels shares. Of those six counts, two of the counts charged certain of the defendants with the violation of the general corporation laws of the State of Delaware, while the other four counts charged all of certain of the individual defendants with the violation of Section 10(b) of the Securities and Exchange Act of 1934,⁵ Section 17(a) of the Securities Act of 1933,⁶ Section 9(a)(4) and 9(e) of the Securities and Exchange Act of 1934,⁷ and Section 12(2) of the Securities Act of 1933.⁸

Of the five counts relating to the transaction for the purchase of shares of Hilton Credit, one count charged certain of the defendants with violation of the general corporation laws of the State of Delaware, while the other four counts charged some, or all, of the individual defendants with the violation of Section 10(b) of the 1934 Act, Section 17(a) of the 1933 Act, Sections 9(a)(4) and 9(e) of the 1934 Act, and Section 12(2) of the 1933 Act.

With respect to the Hotels Corporation stock purchase, the complaint prayed for a judgment against the individual defendants for the damages sustained by the corporation because of their allegedly illegal acts, and that they make restitution to the corporation for its losses. The five counts related to the purchase of Hilton Credit shares prayed for a judgment against the individual defendants for the damages sustained by Hilton Hotels because of that transaction, and that the individual defendants be required to account to the Hotels Corporation for all profits, gains and benefits realized by them as a result of their allegedly illegal acts and breach of their fiduciary duty.

The complaint was signed by certain of plaintiff's attorneys, and was verified by the affidavit of plaintiff. On

⁵ 15 U.S.C. 78j.

⁶ 15 U.S.C. 77q.

⁷ 15 U.S.C. 78i.

⁸ 15 U.S.C. 77l.

that affidavit plaintiff swore that certain of the allegations of the complaint were true. She verified a majority of the allegations of the complaint upon information and belief.

On February 25, 1964, after the complaint was filed, but prior to the filing of any answer thereto, the defendant[s], pursuant to an order of the court below, took the deposition of plaintiff. At that deposition the defendants' attorneys inquired of the plaintiff as to the basis for swearing that certain of the allegations were true. She replied to those questions that she "did not know" and "did not know anything about it." She was then questioned relative to the factual basis of a number of the specific allegations made on information and belief. In each instance she answered, in effect, that she didn't understand it and couldn't explain it, and that she did not know. Upon the stipulation of counsel, the general question was then asked as to whether plaintiff knew any facts at all upon which she based the allegations made on information and belief, to which she answered, "I don't know. I can't give you no facts because I don't understand it."

She identified her signature on a letter of protest mailed to the corporation over her name, but when shortly thereafter she was asked upon what basis she had alleged that she had made a protest to the corporation of the stock purchase offer, she replied, "I don't know" and "I don't know nothing about it." At one point in the deposition she replied, "I have no information because my son-in-law, [Irving Brilliant] I left it to him, and he was the one that knew all about it."

In response to questions from her own attorney she stated that she had turned the transmittal letter and the offer to purchase Hilton Hotels stock, and other letters relative to that transaction, over to Mr. Brilliant, who had brought the protest letter to her and asked her to sign it and that she had signed it. She further stated that Mr. Brilliant had brought her the complaint and explained it to her whereupon she had signed it. She further stated at one point that Brilliant had said that

"He would like to take action" and that, "He said he would take care of it * * *. I left it to him."

On the same day, following the taking of plaintiff's deposition, the defendants served notice on plaintiff that they would, on the following day, February 26, 1964, move to dismiss the complaint on the ground that it was a sham pleading and on the further ground that the plaintiff, Dora [fol. 226] Surowitz, was not a proper plaintiff.⁹ At the hearing on February 26, leave was given to the defendants to file plaintiff's deposition, and plaintiff was given fifteen days to file whatever documents she deemed appropriate in opposition to the motion to dismiss.

Within the fifteen days allowed, plaintiff filed the affidavits of Mr. Brilliant and of Walter J. Rockler, one of plaintiff's attorneys.

The affidavit of Brilliant stated that he had a legal education, but that he worked as a professional investment counselor; that, as of December, 1962, members of his immediate family owned more than 2350 shares of Hilton Hotels common stock; that he had purchased one hundred shares of Hilton Hotels stock for the plaintiff on August 1, 1957; that in December, 1962, plaintiff brought him the papers relating to the offer of Hilton Hotels to buy a part of its own stock, whereupon he informed her that he was studying the matter; that he conferred with Mr. Rockler after which he and Rockler reached the conclusion that the transaction was questionable and should be objected to; that Mr. Rockler prepared a letter of protest which plaintiff signed after the nature of its contents was explained to her by Brilliant; that he conducted investigations and research into the transaction and communicated with Mr. Rockler with respect thereto; that Hilton Hotels stock declined in market price in 1963 and the corporation passed the 1963 dividend; that plaintiff asked him about that, whereupon he told her that Rockler was of the opinion that the officers

⁹ The latter ground, based upon the contention that plaintiff was not a shareholder contemporaneously with the transactions of which complaint is made, is obviously ill founded and was apparently abandoned by defendants in the court below.

and directors of the corporation had engaged in wrongful conduct and it might be wise to bring suit; that plaintiff then stated that she was willing to sue; that he received the complaint from Mr. Rockler, which he read and explained to plaintiff, and that he informed her that the charges contained in the complaint reflected the investigation made by himself and Rockler and that the same were soundly based; and that thereupon plaintiff signed and verified the complaint.

[fol. 227] The affidavit of Mr. Rockler described in some detail the investigations undertaken by him and other attorneys working with him which led to his knowledge that the positive allegations of fact of the complaint were true, and that he had gained information upon which he believed that all other allegations of the complaint were true and well founded.

After argument upon defendants' motion to dismiss, and after reviewing plaintiff's deposition and the affidavits submitted to him, the trial judge entered an order on March 30, 1964, striking plaintiff's complaint.

In his memorandum order striking the complaint, the trial court found that the verification of plaintiff was false inasmuch as her deposition revealed that she had no knowledge of the facts which she had therein sworn to be true, and that she had lacked any information to support her verification on information and belief of the acts of misconduct and wrongdoing alleged in the complaint. The court therefore held that the verification of the complaint was a nullity and inconsistent with the verification requirements of Rule 23(b).¹⁰ The court concluded that, in

¹⁰ In pertinent part, Rule 23(b) provides:

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains * * * and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The

the absence of a motion for leave to substitute any other verification or to file an amended complaint, the suit must be dismissed. The court further held that the plaintiff's attorneys who had signed the complaint violated Rule 39 of the District Court for the Northern District of Illinois in that they had filed affidavits falsely stating that they knew of no agreement for the sharing of costs or the payment of plaintiff's expenses in this suit, as shown by a comparison of such affidavits with the statement contained in the Brilliant affidavit that certain members of his family had undertaken and would undertake to pay the major part of the costs and expenses of the plaintiff's suit.

[fol. 228] This appeal is prosecuted to review that decision.

The last ground mentioned upon which the complaint was dismissed can be quickly disposed of. There is nothing in the Brilliant affidavit which indicates that Mr. Rockler or any other of plaintiff's attorneys were advised at the time when their Rule 39 affidavits were filed that Brilliant and other members of his family had agreed to bear a large part of the burden of expense connection with this suit.¹¹ There is thus absent any evidence that any of the three affidavits by plaintiff's attorneys stating that each knew of no payment or promise of payment of expenses was a false statement by any of the three attorneys. So far as the order of dismissal rests upon the deter-

complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees * * * such action as he desires * * * ." F.R.C.P. 23(b), 28 U.S.C.A.

¹¹ The only relevant statement contained in the Brilliant affidavit is the following narrative of a conversation not in the presence of any of the attorneys:

"I told Mrs. Surowitz that there would be expenses involved in suing and that, since members of the family owned a substantial amount of Hilton stock it was reasonable to assume that the members of the family would be willing to pay a major part of the expenses."

mination that the attorneys had violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous. To the extent that the decision rests upon that finding, the record before us does not sustain it.

The determinative issue of this appeal deals with the proper interpretation of the provision of Rule 23(b) which requires that a complaint in a derivative cause of action must be verified.¹²

Before approaching that issue, we will first consider plaintiff's argument that Rule 23(b) could not be applied to this complaint inasmuch as eight of its eleven counts are based upon the federal securities acts. Thus the plaintiff argues, as to those eight counts, that the complaint cannot properly be construed as derivative because federal law is the jurisdictional basis thereof.

We certainly agree with the plaintiff's thesis that the policy of the federal securities laws is to protect investors, including the uninformed, the ignorant, and the gullible. However, the statement of that thesis begs the question which is here presented. We think it clear from an examination of the sections of the securities laws upon which [fol. 229] the complaint is founded, in the light of the allegations of the complaint itself, that the counts of the complaint which are based upon federal law are wholly derivative.

Section 12 of the Securities Act of 1933, 15 U.S.C. 77l, provides, in pertinent part, that any person who offers or sells a security in violation of certain provisions of the act "shall be liable to the person purchasing such security from him."¹³ The cause of action created by that section accrues only to the purchaser of securities sold in violation thereof. *Slavin v. Germantown Fire Ins. Co.*,

¹² Note 10, *supra*.

¹³ "Any person who [offers or sells a security in violation of certain provisions of this title] shall be liable to the person purchasing such security from him, who may sue * * * to recover the consideration paid for such security with interest thereon * * * upon the tender of such security, * * * ." 15 U.S.C. 77l.

3 Cir., 174 F. 2d 799; *Cf.*, *MacClain v. Bules*, 8 Cir., 275 F. 2d 431.

Section 9 of the Securities and Exchange Act of 1934, 15 U.S.C., 78i, provides that a person who purchases or sells a security, the price of which was affected by certain manipulative practices proscribed by that section may recover damages from any person who willfully participated in such manipulative practices.¹⁴

Thus Section 9 of the 1934 Act, like Section 12 of the 1933 Act, creates a cause of action which accrues only to a purchaser or seller of securities, the price of which is affected by the manipulative practices therein proscribed.

Hilton Hotels, not plaintiff, is alleged to be the purchaser of the securities involved in this suit. It affirmatively appears that plaintiff did not sell any of the securities involved. Plaintiff is, therefore, without any personal right of action under either of those sections. Her interest is [fol. 230] secondary and derivative, and the right alleged is the right of the corporation.

Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78j, and Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q, each declare certain conduct to be unlawful without specifically authorizing actions for damages thereunder.¹⁵ It has been held that civil liability

¹⁴ Section 9 declares unlawful, among other acts, any act or practice done with a design to create an appearance of active trading of a security or to raise or depress the price of such security for the purpose of inducing the purchase or sale of such security by others. The section then provides, in part:

"(e) Any person who willfully participates in any act or transaction in violation [of this section], shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue * * * to recover the damages sustained as a result of any such act or transaction. * * *." 15 U.S.C. 78i.

¹⁵ Section 10 of the 1934 Act provides, in part:

"It shall be unlawful for any person, * * *, by the use of any means or instrumentality of interstate commerce or of the mails, * * *—

(footnote continued on next page)

under each of those sections is implied by the language which makes the proscribed conduct unlawful. *Pfeffer v. Cressaty*, S.D. N.Y., 223 F. Supp. 756, and *Osborne v. Mallory*, S.D. N.Y., 86 F. Supp. 869; *Cf.*, *Texas Continental Life Ins. Co. v. Bankers Bond Co.*, W.D. Ky., 187 F. Supp. 14; Compare, *Trussell v. United Underwriters, Ltd.*, D. Colo. 228 F. Supp. 757, all interpreting Section 17 of the 1933 Act; *E.g.*, *Ellis v. Carter*, 9 Cir., 291 F. 2d 270, *Matheson v. Armbrust*, 9 Cir., 284 F. 2d 670, cert. denied 365 U.S. 870, *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195, cert. denied 365 U.S. 814, and *Fischman v. Raytheon Mfg. Co.*, 2 Cir., 188 F. 2d 783, applying Section 10(b) of the 1934 Act.

Where it has appeared that a corporation was the party injured by a violation of Section 10(b) of the 1934 Act, the courts have held that a shareholder of that corporation had standing to sue only on a derivative basis. *Birnbaum v. Newport Steel Corp.*, 2 Cir., 193 F. 2d 461, cert. [fol. 231] denied 343 U.S. 956; *Slavin v. Germantown Fire*

“(a) * * * *

“(b) To use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. 78j.

Section 17 of the 1933 Act provides in pertinent part:

“(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

“(1) to employ any device, scheme, or artifice to defraud, or

“(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

“(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.” 15 U.S.C. 77q(a).

Ins. Co., 3 Cir., 174 F. 2d 799, 805-806; *Kremer v. Selheimer*, E.D. Pa., 215 F. Supp. 549, 552.

Though we have found no authority treating this precise question under the provisions of Section 17(a) of the 1933 Act, the plain language of that Section convinces us that any cause of action arising under that Section is a right of the person injured by the acts and practices therein proscribed. When injury is alleged to have been incurred by a corporation, its shareholders can prosecute a suit only upon a derivative basis.

Assuming that each of the eight counts of this complaint based upon the federal statutes states a cause of action, each cause is that of Hilton Hotels, not a cause personal to plaintiff. Her interest and her right to file a suit are clearly secondary and derivative.

Gottesman v. General Motors Corp., S.D. N.Y., 28 F.R.D. 325, is not in point, but is of interest upon this question. The complaint in that case was a shareholder's derivative suit based upon a claim of alleged violation of the federal anti-trust laws. There it was argued that the provision of Rule 23(b) which requires that a plaintiff have been a shareholder at the time of the injury of which he complained could not be applied because the cause of action involved a federal question. That argument was rejected, the court saying that Rule 23(b) must be applied to a derivative suit whether jurisdiction of the court be based upon a federal question or upon diversity of citizenship.

Plaintiff's historical argument, that Rule 23(b) was designed only to prevent the creation of federal jurisdiction by collusion, is not persuasive. That rule is also designed to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit. Cf., *Gottesman v. General Motors Corp.*, 28 F.R.D. 325, 326. Although such a suit does have secondary value to a shareholder plaintiff in the protection of the financial integrity of his investment in a corporation, the necessity for the contemporaneous protection of the corporation itself [fol. 232] and of its officers and directors from ill-conceived, nuisance-value litigation is, at least, a consideration of equal

value. *Cf.*, *Pioche Mines Consolidated, Inc. v. Dolman*, 9 Cir., 333 F. 2d 257, 265.

The cases cited by plaintiff, arising under Section 16(b) of the Securities and Exchange Act of 1934,¹⁶ are wholly inapposite.¹⁷ Those cases simply held that the contemporaneous ownership requirement of Rule 23(b) is not applicable to such litigation because of the express authorization contained in Section 16(b) for a suit by "the holder of any security."

Plaintiff's reliance upon *Borak v. J. I. Case*, 7 Cir., 317 F. 2d 838, aff'd. 84 S. Ct. 1555, is likewise wholly misplaced. In that case we dealt only with the application of the Wisconsin security for expense statutes to a cause of action arising under the provisions of the Securities and Exchange Act.¹⁸ No question under Rule 23(b) was presented.

We conclude that the principal issue presented upon this appeal is not affected by the fact that eight of the eleven counts rely upon federal law as a jurisdictional basis. Plaintiff's suit is derivative and is governed by the provisions of Rule 23(b).

The crucial issue presented by this appeal, namely, the interpretation of the verification requirement of Rule 23(b), is without guiding precedent. It is also an issue which opens the door to sophistries of argument, some of which tend more to cloud the issue than to elucidate it. In the portion of our opinion which follows, we have sought to avoid the invitation extended by the briefs to fish in the dark waters of speculation and have applied our best judgment to the decision of a close question of law.

We reject plaintiff's initial argument that the record before this court cannot support the finding that she was [fol. 233] without relevant knowledge when she verified the

¹⁶ 15 U.S.C. 78p.

¹⁷ *Dottenheim v. Murchison*, 5 Cir., 227 F. 2d 737, cert. denied 351 U.S. 919; *Blau v. Mission Corp.*, 2 Cir., 212 F. 2d 77, cert. denied 347 U.S. 1016; *Pellegrino v. Nesbit*, 9 Cir., 203 F. 2d 463; *Benisch v. Cameron*, S.D. N.Y., 81 F. Supp. 882.

¹⁸ That suit involved the provisions of 15 U.S.C. 78n(a) and 78 aa.

complaint because the questions upon the deposition related to the plaintiff's knowledge on February 25, 1964, not to her knowledge approximately two and one-half months previously when she had verified the complaint.

We would agree that plaintiff's argument has verity insofar as the questions asked upon deposition related to technical, evidentiary facts bearing upon the allegations of the complaint. In most cases, the plaintiff in a shareholders derivative suit is merely the instrument for bringing the suit to the court. By hypothesis, most such plaintiffs would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance. Most of them, also, would have to rely upon the opinions and advice of trained counsellors for many of the principal allegations of such a complaint.

Reading the deposition most favorably to plaintiff, there is no question that she stated as positive fact essentially four things. These are that she was an owner of Hilton Hotels stock, that the stock missed a dividend, that she thought that her stock was not right, and that she had consulted Mr. Brilliant relative to the meaning of the written offer submitted to her for the purchase of a number of Hilton Hotels shares. In the same light, no one can successfully refute plaintiff's positive statements that she did not know who the individual defendants were, that she did not know of any wrongful acts which they had done, that she did not know of any facts upon which she had alleged that the individual defendants had caused the purchase offers to be made, that she knew nothing about any protest which she had made to the corporation, except for the fact that she had signed a letter shown to her, and that she did not understand the factual basis of her complaint.

It appears from the record that plaintiff is an immigrant woman who works as a seamstress and who has a limited education. It also appears that she has a very limited capacity for reading the English language. From such apparent facts, it must then be concluded that plaintiff is among the most unsophisticated of investors.

We think a sensible interpretation of the verification requirements of Rule 23(b), in the light of the realities

[fol. 234] of litigation of this nature, must relieve the plaintiff after two and one-half months from the necessity of recalling technical factual information which she received from trusted advisors and upon which she acted pursuant to their advice. On the other hand, we find it inconceivable that the instigator of a suit of this nature could fail to know the identity of the individual defendants as directors and officers of the corporation and to know in a general sense what wrongful acts she conceived to have been done which formed the whole supporting skeleton for the suit which she has filed. We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant.

It has been held in the context of the bankruptcy statutes that there was no verification of a petition because it appeared upon a trial of the case that the petitioners had no knowledge of any of the acts of bankruptcy which they had alleged in their petition under oath. *In re Frank*, E.D. Pa., 234 Fed. 665, aff'd 3 Cir., 239 Fed. 709. We think the same principle applies under the provision of Rule 23(b).

Rule 23(b) is one of the few instances in which the federal rules require verification of pleadings. We think that that provision requires something more than the mere formality of recklessly swearing to the truth of matters not known. The derivative suit is a unique vehicle of litigation. The holder of one share of stock who is disgruntled at some act of a corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel a plaintiff to begin such a suit with sufficient knowl-

[fol. 235] edge of facts and information to show by his verification that there is a substantial basis to support the complaint which he makes.

As we have indicated, we conceive that all but the most sophisticated investors must rely upon attorneys, or other advisors to supply a substantial part of the information upon which any such complaint rests. We think that the Rule would be satisfied by a verification of intricate factual and conclusory allegations in reliance upon such advice and information. But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint.¹⁹

There can be no question that that minimal requirement was not satisfied in this case. On the contrary, it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about. We must conclude that there was, in fact, no verification of this complaint.

That conclusion cannot be altered by the fact that many of the material allegations of the complaint are obviously true and cannot be refuted. Nor can it be altered by the fact that plaintiff is a person having little education and, quite apparently, wholly lacking in sophistication in financial matters. Those limitations can't apologize for her affirmative statements, for example, that she knew of no facts upon which she alleged that the individual defendants

¹⁹ Plaintiff argues that ample assurance against a frivolous suit is found in the requirement of Rule 11, F.R.C.P., 28 U.S.C.A., that an attorney certify by his signature to a complaint that it rests upon a sound basis. Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a mere semantic exercise in the drafting of its provisions. Had they intended the certification provision of Rule 11 to supersede the verification provision of Rule 23(b), we think that the latter provision would have been omitted. We think the intent was to impose a condition of added assurance in the narrow field to which 23(b) applies.

had caused the stock purchase offers to be made, and that she did not know why she had alleged that those defendants [fol. 236] had committed any of the unlawful acts alleged. These things she must have known to give legitimacy to the serious charges made against those individuals.

Neither *Murchison v. Kirby*, S.D. N.Y., 27 F.R.D. 14, nor *Freeman v. Kirby*, S.D. N.Y., 27 F.R.D. 395, which are cited by plaintiff, has any conceivable bearing upon the issue before us. Both of those cases arose under Rule 11, F.R.C.P., 28 U.S.C.A., and neither involved any question of the interpretation of Rule 23(b).²⁰

No questions of fact were presented by the Brilliant and Rockler affidavits. Those affidavits reveal that substantial and diligent investigation by Brilliant, Rockler and others preceded the filing of this complaint. They would, in our opinion, completely refute the merit of any motion under Rule 11 directed against this complaint. Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant

²⁰ Because Murchison had stated, in answer to certain questions upon his 1800 page deposition, that he had no personal knowledge of certain of the facts alleged in his verified complaint, the defendants in a derivative suit moved to strike the complaint as a sham pleading because Murchison's attorneys had permitted him to verify facts of which he had no personal knowledge. It was not contended that Murchison lacked knowledge of the basic facts as to the official identity of the defendants and the theory of his cause of action. He stated upon his deposition that he had relied upon information supplied by his retained attorneys in verifying the truth of certain material allegations. The court denied the motion to strike, saying that it was not necessary for a plaintiff to have direct knowledge of all evidentiary details where it appears that his verification rests upon information supplied by attorneys expressly authorized to file the complaint. *Murchison v. Kirby*, S.D. N.Y., 27 F.R.D. 14, 18, 19, n. 10, n. 11. See also *Hoover v. Allen*, S.D. N.Y., 180 F. Supp. 263, 265.

A complaint based largely upon an attorney's copying part of the Murchison complaint, and filed in the name of a plaintiff who agreed "to lend his name" to the suit was stricken as sham in *Freeman v. Kirby*, S.D. N.Y., 27 F.R.D. 395, 398. The court held that there was proof that the attorney was without any information upon which he could certify under Rule 11 that the complaint stated a good cause of action.

knowledge or information other than the fact of her stock ownership.

Brilliant does state in his affidavit that he read the complaint to plaintiff before she signed it, but it seems obvious from her deposition that she had no conception of the matters read. If the contention was that this was a sham [fol. 237] pleading in the sense that it was without arguable foundation, these affidavits would, in our opinion, have a controlling bearing upon the disposition of the defendant's motion. A pleading may, however, be sham in respects other than the lack of an arguable foundation to sustain it. We think the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand.

The question whether the Rockler affidavit may serve as a verification for this complaint is not before us. There was no motion for a substituted verification in the court below and no submission of any amendment to the complaint. We express no opinion upon the question whether verification of a stockholder derivative complaint by attorney would satisfy the requirements of Rule 23(b).²¹

The court below had inherent power to dismiss this complaint because of plaintiff's non-compliance with the Rule. Rule 41(b), F.R.C.P., 28 U.S.C.A.; *Johnson v. Brandon Corp.*, 4 Cir., 183 F. 2d 444; *Cf.*, *Meeker v. Rizley*, 10 Cir., 324 F. 2d 269, 271.

²¹ Where the foundation for a derivative complaint was based upon knowledge gained by plaintiff's attorney through his participation in proceedings for the dissolution of a corporation under the New York corporation laws, one court held that verification of such complaint by attorney satisfied the verification requirements of Rule 23(b). *Bosc v. 39 Broadway, Inc.*, S.D. N.Y., 80 F. Supp. 825. To some extent, the court relied upon a New York procedural rule which permitted pleadings to be verified by attorney if the client resided in a county other than that in which the attorney's office was located.

We have considered all arguments advanced by the plaintiff. We have considered the record in the light of plaintiff's limited grasp of the English language and the intricacies of corporate finance. We have considered the peculiar position of a plaintiff in a suit such as this as, principally, the instrument through which the judicial machinery is set in motion. It is not unreasonable to state as a minimum requirement that the plaintiff have general [fol. 238] knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges. We conclude that any lesser requirement would make the verification provision farcical.

Judgment Affirmed.

[fol. 239]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14653

DORA SUROWITZ, individually and on behalf of all other
similarly situated shareholders of HILTON HOTELS COR-
PORATION, Plaintiff-Appellant,

vs.

HILTON HOTELS CORPORATION, a corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

Before Hon. Latham Castle, Acting Chief Judge, Hon.
Luther M. Swygert, Circuit Judge, Hon. Frederick O.
Mercer, District Judge.

JUDGMENT—March 11, 1965

This cause came on to be heard on the transcript of the
record from the United States District Court for the North-

ern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 240] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 241]

SUPREME COURT OF THE UNITED STATES

No. 161, October Term, 1965

DORA SUROWITZ, etc., Petitioner,

v.

HILTON HOTELS CORPORATION, et al.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this petition.

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MAY 20 1964

JOHN F. DAVIS, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. [REDACTED] 161

DORA SUROWITZ, Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION,

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECFOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARON HILTON and HILTON CREDIT CORPORATION, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964.

No. _____

DORA SUROWITZ, Individually and on behalf of all other
similarly situated shareholders of HILTON HOTELS
CORPORATION,

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, CON-
RAD N. HILTON, ROBERT P. WILLIFORD, ROBERT
J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLI-
SON, HENRY CROWN, HORACE C. FLANIGAN,
BENNO M. BECHHOLD, Y. FRANK FREEMAN, WIL-
LARD W. KEITH, LAWRENCE STERN, SAM D.
YOUNG, FRITZ B. BURNS, VERNON HERNDON,
HERBERT C. BLUNCK, CHARLES L. FLETCHER,
ROBERT A. GROVES, JOSEPH A. HARPER, BAR-
RON HILTON and HILTON CREDIT CORPORATION,
a corporation,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The Petitioner, Dora Surowitz, prays that a Writ of
Certiorari issue to review the judgment of the United
States Court of Appeals for the Seventh Circuit entered
on March 11, 1965.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 342 F. 2d 596, and is reproduced in Appendix A to this Petition, pages 19-38 *infra*. The findings of fact and conclusions of law entered by the District Court, upon which the cause was dismissed, are contained in the Appendix to Plaintiff-Appellant's Brief filed in the Court of Appeals, at pages 145-58; nine copies of the Appendix have been filed with this Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 11, 1965. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

Petitioner brought a derivative suit in the federal district court as a shareholder acting on behalf of the defendant Hilton Hotels Corporation, alleging that the officers and directors had engaged in multiple violations of the federal securities acts and the corporation laws of the State of Delaware. Petitioner's suit was dismissed with prejudice on the ground that, because of her lack of knowledge and understanding of the basis of the suit, her verification under Rule 23(b) of the Federal Rules of Civil Procedure was false and a nullity. The Court of Appeals upheld this conclusion despite the fact that the verification was largely on information and belief; it further held that a verification which is "false" for lack of comprehension on the part of the plaintiff-verifier is tantamount to a sham complaint.

The questions presented are—

1. In light of the policy of the federal securities acts to protect the ignorant and the unknowledgeable, may a com-

plaint charging serious violations of the securities laws be dismissed because the plaintiff-stockholder in a derivative suit is ignorant and unknowledgeable?

2. Is a verification on information and belief under Rule 23(b) false because the plaintiff is unable to testify to the basis or theory of the suit or the positions and activities of the individual defendants?

3. If the verification is false in the unusual sense that the Court of Appeals found it to be, is a motion to dismiss the suit sustainable where the record discloses substantial evidence that the suit is well-founded and where it contains a verification under oath by counsel attesting that the allegations of the complaint are true?

4. If the verification is in any sense false, is dismissal of a derivative suit for failure to comply with the Rules, as specified in Rule 41(b), an appropriate or proper remedy?

STATUTES INVOLVED.

The statutes involved are Sections 10(b) and 9(a) and (e) of the Securities and Exchange Act of 1934 (15 U. S. C. 78j, 78i) and Sections 17(a) and 12(2) of the Securities Act of 1933 (15 U. S. C. 77q, 77l). These statutes are reprinted in Appendix B hereto, pages 39-41 *infra*. The case also involves the construction of Rules 11, 23(b) and 41(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This suit was filed by Dora Surowitz, a shareholder in defendant Hilton Hotels Corporation, on behalf of herself and other shareholders, charging that the officers and directors of the Corporation had defrauded it and its stockholders of large sums of money, contrary to their fiduciary obligations and in violation of the Securities Act of 1933,

the Securities Exchange Act of 1934, and certain provisions of the Delaware corporation law (App. 1-63). Petitioner alleged that the officers and directors acted improperly and unlawfully in connection with two transactions: (1) the offer to purchase and the purchase by the Corporation of 300,000 shares of its own common stock, including over 100,000 shares owned by officers and directors; and (2) the offer to purchase and the purchase by the Corporation of approximately 1,058,000 shares of defendant Hilton Credit Corporation stock, including over 631,000 shares held by officers and directors of the Hotels Corporation. The Complaint charged that the Corporation thus was caused unnecessarily to expend almost \$12,000,000, of which approximately \$4,800,000 was paid to the officers and directors.

The theory of the Complaint is that these two stock-purchase transactions lacked any proper corporate purpose and were intended by the officers and directors to enable certain insiders, particularly Conrad Hilton and Henry Crown and members of their families, to sell their shares at higher prices than could be obtained on the market. To accomplish their purpose, the Complaint charged, the individual defendants made or caused to be made numerous false and misleading statements and failed to disclose relevant information to the Corporation's shareholders. They thus succeeded in selling to Hilton Hotels Corporation shares of stock they held in that Corporation and in the Credit Corporation at very favorable prices, at a time when they knew or should have known that the business affairs of the Hotels Corporation would shortly lead to a substantial drop in the value of its shares, and at a time when the expenditure of large sums for the purchase of shares was detrimental to the welfare of the Corporation.

Prior to pleading, defendants took the deposition of Petitioner (App. 94-114). Relying upon the deposition, they moved to dismiss on two specific grounds: (1) that the

complaint was a sham pleading; and (2) that the Petitioner was not a proper party plaintiff (App. 117-118). Defendants filed an affidavit in support of their motion (App. 93), and Petitioner filed two affidavits in opposition (App. 120-143). Without hearing evidence, the District Judge granted defendants' motion, dismissing the cause on the ground that Petitioner's verification under Rule 23(b) was false, and on the further ground that Petitioner's counsel had filed false affidavits under Rule 39 of the Rules of the District Court for the Northern District of Illinois (App. 145-58).

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the dismissal,¹ declaring that "the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life." In reaching its admittedly novel and unprecedented conclusion (App. A 32 *infra*), the Court of Appeals apparently reasoned as follows:

1. If verification under Rule 23(b) is to be meaningful and is to furnish added assurance of the "legitimacy" of a complaint (App. A 36 *infra*), the plaintiff must have a knowledge of his relationship to the suit, the official identities of the parties charged, and a general understanding of the foundation of the complaint (App. A 35 *infra*). Petitioner, a woman of little education, wholly lacking in financial comprehension, did not have any grasp of the offenses charged and could not identify the individual defendants in their corporate roles as officers and directors.

1. It held, however, that "so far as the order of dismissal rests upon the determination that the attorneys had violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous." (App. A. 27 *infra*.)

Her verification of the complaint was “without knowledgeable or informative comprehension” (App. A 37 *infra*). It was, therefore, “false” (App. A 34 *infra*). The verification, being “false” in this sense, made the complaint a sham (App. A 37 *infra*).

2. Neither counsel’s certification by signing the complaint nor counsel’s affidavit (App. 135-143) detailing the investigations conducted prior to filing the complaint and attesting to the truth of the complaint remedied the defect (App. A 25, 35, 37-38 *infra*).

3. The policy of the federal securities laws has nothing to do with the case (App. A 27-31 *infra*). That policy may be to protect the gullible and ignorant, but, since the case involves a derivative action, the plaintiff must verify. Petitioner is too ignorant to verify properly. Therefore, as an ignorant and inherently unfit stockholder, Petitioner is barred by Rule 23(b) from complaining of these securities acts violations.

4. The complaint is a sham even though many of the allegations are “obviously true and cannot be refuted” (App. A 36 *infra*). Indeed, although not a single allegation is shown to be false in any way, the complaint is a sham. The suit was properly dismissed with prejudice under Federal Rule 41(b) (failure to comply with court rules or orders) (App. A 38 *infra*).

5. In essence, therefore, the Court of Appeals held that, by reason of Petitioner’s limited understanding and knowledge—defects inherent in her limited education, limited command of English, and limited knowledge of corporate and financial matters—“there was, in fact, no verification of this complaint.”² Rule 23(b) requires that a plaintiff have

2. The Court refused to accept additional verification by counsel, a part of the record before the Court (App. 135, 142, 143), because it was filed in response to defendants’ motion and not upon separate motion by the plaintiff or as an amendment to the complaint (App. A 37-38 *infra*).

communicable comprehension. Petitioner did not have it, and thus her suit is barred.

REASONS FOR GRANTING THE WRIT.

I. The decision of the Court of Appeals involves important issues as to the role of individual stockholders in the enforcement of causes of action under the Securities Acts.

In recent years liquid funds in corporate treasuries have accumulated to such an extent that, under various circumstances, they represent an attractive, indeed lucrative, market for the sale of the corporation's own securities.³ Tenders to the corporation itself are phenomena of increasing frequency.⁴ They apparently do not require registra-

3. Thus, total corporate net current assets in billions of dollars have increased as follows:

| | | | | |
|------|----|----|----|-------|
| 1945 | .. | .. | .. | 51.6 |
| 1955 | .. | .. | .. | 103.0 |
| 1960 | .. | .. | .. | 128.6 |
| 1963 | .. | .. | .. | 151.2 |

Corporate surpluses in billions of dollars have increased as follows:

| | | | | |
|------|----|----|----|-------|
| 1940 | .. | .. | .. | 49.0 |
| 1950 | .. | .. | .. | 129.4 |
| 1955 | .. | .. | .. | 192.8 |
| 1960 | .. | .. | .. | 268.6 |

U. S. Bureau of the Census, *Statistical Abstract of the United States*: 1964, p. 493 (Wash. 1964).

4. An examination of the records of the New York Stock Exchange indicates that tenders, whereby corporations purchase large quantities of their own shares, are becoming increasingly frequent. In the last four years, more than thirty listed corporations (other than Hilton Hotels) have resorted to the technique, including such companies as Martin-Marietta, Skelly Oil Co., United Fruit Co., Textron Corp., Houdaille Industries, Vulcan Materials Corp., and Litton Industries, Inc. In a substantial number of the tenders, it is understood that a particular officer or director will tender a specified number of shares or that any stockholder (including officers and directors) may tender. Without suggesting that any or all of these tenders involved improprieties, it seems clear that the practice calls for scrutiny upon the part of shareholders.

tions, prospectuses, and all the other complications and costs of secondary offerings by shareholders to the public. They are available when, as in 1962, the stock market is depressed. In some cases, as here, "bail-outs" may be attempted without even seeking stockholder approval. In light of the decision below, they may be invulnerable to stockholders' redress if the stockholders cannot personally understand or explain what the insiders have done.

On their face, the two transactions described in the complaint inevitably raise questions as to the propriety of the corporate actions. Given the facts pleaded, it would be naive to expect the Hilton Hotels Corporation to pursue its corporate remedies against the officers and directors who control it. If the transactions are to be looked into, and if the damage to the Corporation is to be remedied and the interests of the stockholders protected, the necessary initiative can only come from one of two sources: the Securities and Exchange Commission or individual stockholders.

One of the purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934 was to enable stockholders, as ancillary enforcers, to initiate suits for violation of the substantive provisions of the Act. Remedial action could have been left entirely to the SEC. In fact, it was not. Section 12 of the 1933 Act and Section 9 of the 1934 Act specifically authorize individual suits by purchasers of securities; Section 10(b) of the 1934 Act and Section 17(a) of the 1933 Act have been held to support individual causes of action despite the absence of express language creating them. *Fratt v. Robinson*, 203 F. 2d 627 (9th Cir. 1953); *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (2d Cir. 1951); *Hooper v. Mountain States Securities Corporation*, 282 F. 2d 195 (5th Cir. 1960), cert. den. 365 U. S. 814 (1961); *Pfeffer v. Cressaty*, 223 F. Supp. 756 (S. D. N. Y. 1963). Where corporate funds are siphoned off by a bail-out,

such as defendants allegedly planned and implemented in this case, using false, incomplete, and misleading communications to the stockholders in the process, the logical parties to bring the matter to court are individual stockholders.

The Court of Appeals acknowledged the strong policy of the securities laws to protect small investors (App. A. 27 *infra*). It implied, however, that the policy was not designed to protect a stockholder who *derivatively* seeks redress under the securities acts (App. A. 27-32 *infra*).⁵ The Court of Appeals seems to suggest that, while an ignorant stockholder *qua* individual stockholder is protected by the Securities Acts, that protection does not extend to an ignorant stockholder asserting a *corporate* cause of action. But where the corporate treasury is raided by the controlling stockholders, officers, and directors, in violation of the securities laws, the rights of the corporation and its stockholders can realistically be protected *only by minority stockholders in a derivative suit*, because the plunderers control the corporation.

The decision of the Court of Appeals represents a significant impairment of the right of a stockholder to bring to court a corporate cause of action against insiders. Although the Court below recognizes that stockholders are proper instruments for bringing the cause to court, *it divides them into two classes*: Stockholders who have the capacity to understand corporate transactions *and those that do not*. Petitioner is so unsophisticated and lacking in understand-

5. In support of its view, the Court cited two decisions, *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), and *Slavin v. Germantown Fire Ins. Co.*, 174 F. 2d 799 (3rd Cir. 1949). Neither of these cases involved suits based on the abuse of using the corporation as a buyer or seller of securities. Rather, although the cases involved stockholders' suits, the corporations were not parties to the transactions complained of; other stockholders dealt in their securities with *third* persons.

ing that, although matters were read and explained to her, the Court concluded "that she had no conception of the matters read." (App. A. 37 *infra*.) In effect, therefore, the Court of Appeals approved the dismissal of a meritorious cause of action simply because Petitioner, the plaintiff-stockholder, was too limited to understand what she was told about it by her advisors.⁶

In this case, by a new form of "literacy test" imported into the Federal Rules, the Court pronounces the ignorant stockholder unfit for the protections of the securities laws.⁷

6. Although the Court of Appeals relates the stockholder's ability to understand to an assurance of merit in the suit, the relationship is far from obvious. How is the good faith character of the action established by the stockholder's analytical capacity? If the plaintiff is very simple, limited in experience and outlook, and inarticulate, does this prove that the suit is worthless? If the plaintiff is clever and learns corporate lessons well, does this prove that the suit has merit?

Moreover, the Court of Appeals has left the necessary minimum quantum of comprehension dangerously undefined. Must the plaintiff-stockholder discover that minimum himself, or may he rely on counsel to furnish basic facts? Is the stockholder adequately informed if he states and believes simple conclusions but cannot support those conclusions by reference to any underlying facts? Further, may a stockholder rely on what his attorneys and advisors tell him and verify on information and a belief derived wholly from communications from them?

7. At least one District Court in the Seventh Circuit, hailing "this landmark decision", has regarded the decision of the Court of Appeals as a great aid in judicial administration because it will reduce the volume of corporate litigation. *Gagnon v. Buchanan, et al.*, No. 65-C-189, ND. Ill., comments of Chief Judge Campbell in dismissing the suit, April 15, 1965, on other grounds. When courts applaud new technical devices for dismissing good causes of action, *without considering the merits*, it is surely time to ask whether courts exist to dispense justice or simply to process, as in a production line, pieces of legal paper.

II. The decision of the Court of Appeals presents important and novel questions as to the proper interpretation of the Federal Rules of Civil Procedure, particularly Rules 23(b), 11, and 41(b).

So far as we can ascertain, no similar case has ever before been so decided by any federal court. The Court of Appeals admitted that the "crucial issue . . . namely, the interpretation of the verification of Rule 23(b), is without guiding precedent" (App. A. 32 *infra*). Moreover, it stated that it was deciding "a close question of law" (App. A. 32 *infra*).

The Court of Appeals held that a complaint may be sham, and therefore dismissible, in some sense other than shamness under Rule 11. There is no authority in the Federal Rules of Civil Procedure or in the decisions of any court to support this view. The Court of Appeals has clearly undertaken to make new law in an area of great importance under the Federal Rules.⁸

To achieve its result, the Court of Appeals interpreted Rule 23(b) in a fashion quite out of keeping with the Rule's history and purpose. The primary objective of the Rule was and is to prevent collusion by the corporation with a stockholder in order to permit the bringing of a corporate cause of action in a federal court on grounds of diversity of citizenship where the corporation, if it brought suit, could not meet the diversity requirement. *Hawes v. Oakland*, 104 U. S. 450 (1882); *City of Quincy v. Steel*, 120 U. S. 241 (1887); Equity Rule 94, 104 U. S. ix (1882); *Notes of Advisory Committee on the Rules*, Rule 23. The Rule addi-

8. Since verified complaints are required in several classes of cases other than those brought as derivative suits under Rules 23(b), the Court's concept of what is and what is not a sufficient degree of understanding to support a verification has a wide potential application. See, e.g., Rules 27(a), 65; Bankruptcy Act, 11 U. S. C. Sec. 41(c).

tionally serves to keep ordinary actions at law from being tried as suits in equity in the federal courts. The Court of Appeals stated that Rule 23(b) was "also designed to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit" (App. A 31 *infra*). Furthermore, it considered that a purpose of the Rule was to protect the corporation and its directors "from ill-conceived, nuisance-value litigation" (App. A 31 *infra*).

Assuming that, taken together, these are all purposes of the Rule, it is obvious that not a single one of these objectives is served in any way by the dismissal of this cause. The suit is not collusive in any respect. There is not a shred of evidence to indicate that it involves "speculation in litigation." And finally, none of the defendants and neither the District Court nor the Court of Appeals so much as suggested that the suit is "ill-conceived, nuisance-value litigation." On the contrary, *all parties and both courts below recognized that the charges are serious and that the factual material pleaded in support is substantial.*

Thus Rule 23(b), even if its purposes are as broad as the Court of Appeals holds, is here being applied to cut off, without answer or a hearing on the merits, a cause of action which in no way represents a single one of the evils toward which Rule 23(b) is directed.

Actually, viewed from its origin, Rule 23(b)'s purposes are all accomplished by the verification of Petitioner in this cause. She is and has been a stockholder for a number of years (since 1957, five years before the transactions in question) (App. 96, 121, 125); she is a resident of New York (App. 94); she received the communications sent by Hilton Hotels Corporation having to do with the proposals to purchase stock (App. 109, 122); she signed a letter prepared by counsel and addressed to the Corporation pro-

testing the proposed transactions (App. 97, 116, 122); she discussed the subject of the corporation and its actions with her son-in-law and financial advisor, especially when the usual dividend was passed (App. 95-96, 109-112, 123-124); upon advice of her son-in-law and of legal counsel, she authorized the bringing of suit against the officers and directors (App. 123-124).⁹ Moreover, she *knew* and *verified* as facts these essential allegations, which are *the allegations specifically called for under Rule 23(b)*; she verified the other allegations upon belief in the information obtained by her son-in-law and by legal counsel and imparted to her by her son-in-law. Mrs. Surowitz' crime is that she could not understand all that she was told.

Clearly, Petitioner has the necessary *status* to act as the instrumentality for bringing the corporate cause of action to court. How can that *status* be taken away from her because of her inability to explain the complaint on deposition? In what fashion did Petitioner defy the Federal Rules so as to warrant summary dismissal under Rule 41(b)?

III. The decision of the Court of Appeals is in conflict with the view of derivative suits adopted by this Court in *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U. S. 518.

In the *Koster* case, a derivative suit initiated by a shareholder in New York was held to be properly dismissed on grounds of *forum non conveniens*, primarily because the

9. The Court of Appeals declared that "it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file . . ." (App. A 35 *infra*). The record does not support this inference. See App. 120-124. But even if Petitioner had improper motives, which is not charged, the right to maintain the action would not thereby be diminished. *Young v. Higbee*, 324 U. S. 204, 214 (1945); *Magida v. Continental Can Co., Inc.*, 231 F. 2d 843, 847-848 (2d Cir. 1956); *Hollander v. Breeze Corp., Inc.*, 131 N. J. Eq. 585, 589, 26 A. 2d 507, 511 (1941).

presence of the plaintiff-stockholder at the place of trial in New York (as opposed to Illinois, where the defendant company had its headquarters) was not necessary to the suit. It was urged by the defendants that the residence of the nominal plaintiff was unimportant since he was nothing but the instigator of the action on the part of the corporation. In adopting this view and in approving the granting of the motion, this Court recognized that the stockholder-plaintiff might "be a mere phantom plaintiff with interest enough to enable him to institute the action and little more." So far as the *state of his knowledge* was concerned, the Court noted that the stockholder-plaintiff may "make no showing of any knowledge by which his presence would help to make whatever case can be made on behalf of the corporation." 330 U. S. 518, 525.

Thus, in the *Koster* case, the all but *total lack of knowledge* on the part of the plaintiff-stockholder was held to justify requiring that the case be brought in a forum other than the one where he resided. Here, according to the Court of Appeals, *the same mental state* on the part of Petitioner—absence of knowledge—is held to constitute a defect fatal to the stockholder's right to sue at all.

The decision of the Court of Appeals refuses to recognize that *status as a stockholder* is what gives the individual stockholder the right to sue. It insists that a stockholder must have a degree of personal knowledge and understanding to come to court in the very kind of case widely recognized as primarily a "lawyer's case," in which "the facts are peculiarly within the defendants' knowledge and the sources of information are subject to their control." Hornstein, "Legal Controls for Intracorporate Abuse—Present and Future," 41 Col. L. Rev. 405, 416-417 (1941).

IV. The decision of the Court of Appeals is in conflict with the law prevailing in the Second Circuit.

Diligent research has uncovered only two decisions, both in the Second Circuit, that are reasonably close, in the nature of the problem presented, to the present case: *Murchison v. Kirby*, 27 F. R. D. 14 (S. D. N. Y. 1961), and *Freeman v. Kirby*, 27 F. R. D. 395 (S. D. N. Y. 1961). The Court of Appeals below took the view that neither "has any conceivable bearing upon the issue before us." This view is most difficult to understand.

In the *Murchison* case, the plaintiff stockholder sought to set aside as fraudulent the settlement of earlier derivative suits involving Alleghany Corporation. One defendant moved to strike the complaint as a sham, because the deposition of plaintiff Murchison indicated that he lacked personal knowledge of many of the allegations. At one point Murchison testified, "My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this thing, and they tell me that they have. • • • I wasn't there, I wasn't listening to them, nobody has given me any written agreements about this deal, so my information is general." 27 F. R. D. 14, 19, note 10.

The defendant contended that, in view of the plaintiff Murchison's lack of knowledge, his attorneys had violated Rule 11 by permitting plaintiff to make a false verification of the complaint. Noting that the defendant's position appeared to be that a plaintiff who asserts a claim "must have personal knowledge of the basic facts upon which he predicates his suit," Judge Weinfeld denied the motion to dismiss as sham, commenting (27 F. R. D. 14, 18-19):

In each instance, where Murchison testified as to lack of personal knowledge of a specific allegation, the defendant has seized upon the answer to charge that his attorneys and counsel permitted him, to use de-

fendant's typical expression, "to make a false affidavit when he alleged paragraph 41 upon 'information,' the falsity of which paragraph they could have ascertained for themselves had they properly discharged their duty as attorneys by appropriate inquiry of Murchison.

* * * *

Completely disregarded by the defendant is Murchison's testimony that the principal source of his knowledge of the allegations of the complaint was his attorneys and counsel, including reports submitted by them to him. Finally, and most important, since the basic question is whether the attorneys in good faith believed there was good ground to support the charges, there is the positive, unequivocal statement by the attesting attorney that before the commencement of the action he and his associates intensively investigated the facts upon which the complaint is based; that during his entire career as a lawyer he had never "spent greater time assuring myself of the existence of direct proof of the essential allegations of the complaint as I did prior to its signing. I not only assure this Court that I knew of 'good ground' to support this complaint when I signed it, but I am convinced that the Kirby-Ireland-Phillips conspiracy to defraud this Court will be proved.

A pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis; otherwise it would deprive a party of his right to a trial of the issues posed by his complaint—it would mean trial by affidavits.

Freeman v. Kirby, 27 F. R. D. 395 (S. D. N. Y. 1961), presents a markedly contrasting situation. There the attorney undertook virtually no investigation; rather, he relied entirely on two memoranda prepared by others and on a draft of the complaint in *Murchison v. Kirby*. Since counsel made no effort to inquire into the truth of the allegations, the court regarded his signature as little more than a "hollow gesture." Even this decision has been criticized as going

"beyond the boundaries established by prior federal and state decisions." 47 Virginia L. Rev. 1434, 1438 (1961).

The Court of Appeals for the Seventh Circuit in the present case has pioneered far beyond *Freeman v. Kirby*. It makes the test of shamness the plaintiff-stockholder's comprehension, not the attorney's efforts to establish sound grounds for bringing the suit. It rejects out of hand Judge Weinfeld's salutary view that "the basic question is whether the attorneys in good faith believed there was good ground to support the charges . . ."

CONCLUSION.

For reasons already stated, the decision of the Court of Appeals is an aberration. It exalts and expands technical requirements to the detriment of justice. It represents a major step toward the immunization of entrenched corporate management from accountability for their acts. It denies elementary equal protection of the laws, by barring as plaintiffs numerous uninformed and ill-educated stockholders who, of necessity, must rely upon their financial mentors and attorneys.¹⁰

There can be no justification for closing the doors of the courts to poorly-educated and uninformed stockholders, unless on the cynical view of Plato's sophist in *The Republic* that "the unjust is lord over the truly simple."

The importance and novelty of the issues presented and the impossibility of reconciling the view of the Court below of the role of a plaintiff-stockholder in a derivative suit with

10. The Court's error is not only one of policy and principle, but also of detail. Thus, the Court asserted repeatedly the requirement that the plaintiff be able to identify the roles of individual defendants (App. A 24, 35 *infra*). Why? How does this protect the integrity of derivative suits? Would the case be different if Mrs. Surowitz could recite that the defendant Robert Caverly is a vice-president and director of Hilton Hotels Corporation?

the views expressed by this Court constitute good reasons why this Petition should be granted. If stockholders' remedies against improper activities by corporate officers and directors are to be circumscribed by importing into the Federal Rules a comprehension test—which must be met as a prerequisite to bringing the corporation's cause of action to court—this Court should do the circumscribing. The law should not be left in the parlous state in which the Court of Appeals appears to have placed it, *where the right to sue turns on a preliminary determination of the plaintiff's state of mind, aptitude, and skill in deposing.*

It is therefore urged that this Petition be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF COURT OF APPEALS.

MARCH 11, 1965.

Before CASTLE, *Acting Chief Judge*, SWYGERT, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. Plaintiff, Dora Surowitz, prosecutes this appeal to review an order of the court below dismissing her complaint in a stockholder's derivative suit.¹

Plaintiff, the owner of 100 shares of the capital stock of defendant, Hilton Hotels Corporation, filed this suit on behalf of herself and all other shareholders similarly situated praying certain relief against the individual defendants as hereinafter delineated. The defendants named in the complaint are Hilton Hotel Corporation, Hilton Credit Corporation, and certain individuals who are officers and directors of Hilton Hotels.

The complaint charged that the individual defendants had defrauded Hilton Hotels of large sums of money in violation of their fiduciary obligations under state law and in violation of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Such fraudulent acts are alleged to have been done through two transactions. In the first of those transactions it is alleged that the individual defendants, as the officers and directors of Hilton Hotels, caused that corporation to offer to purchase and to purchase 300,000 shares of its own common stock at

1. Our reasons for this conclusory statement in spite of the fact that eight counts of the complaint are based upon the federal securities statutes are hereinafter analyzed.

inflated prices. It is further alleged that over 100,000 of such shares were sold to the corporation by various officers and directors of the corporation.² The second transaction alleged is that the individual defendants, as officers and directors of Hilton Hotels, had caused that corporation to offer to purchase and to purchase approximately 1,058,000 shares of Hilton Credit Stock, including over 631,000 shares held by various officers and directors of the Hotels corporation, also at inflated prices.³ The complaint further charged that Hilton Hotels thus was caused to expend approximately \$12,000,000 of which approximately \$4,800,000 was paid to certain of the officers and directors who are named as defendants.

The theory of the complaint is that the two stock purchase transactions above described had no proper corporate purpose, but that the same were intended by the individual defendants to enable certain of their number, particularly the defendants, Conrad N. Hilton and Henry Crown, and members of the families of those defendants, to sell shares of their stock to the corporation at a higher price than they could have obtained on the market.⁴ It further alleged that the individual defendants made or caused to be made numerous false and misleading state-

2. Officers and directors who are alleged to have sold such stock and the respective numbers of shares allegedly sold by each are: Conrad N. Hilton, 85,847; Sam D. Young, 353; Vernon Herndon, 1,147; Herbert C. Blunck, 393; Charles L. Fletcher, 4,100; Robert A. Groves, 6,000; and Joseph A. Harper, 2,150.

3. Officers and directors of Hilton Hotels alleged to have sold such stock and the respective numbers of shares allegedly sold are: Conrad N. Hilton, 375,967; Conrad N. Hilton Foundation, 28,334; Barron Hilton, 126,392; Henry Crown, 70,631; Charles L. Fletcher, 24,100; Robert P. Williford, 14,150; Vernon Herndon, 4,408; and Robert J. Caverly, 464.

4. The complaint alleged that the individual defendants engaged in manipulative practices which resulted in artificially inflating the market prices of both Hilton Hotels and Hilton Credit shares immediately preceding their issuance of the corporation's offers to purchase such shares.

ments, in that they failed to disclose relevant information to the shareholders of Hilton Hotels related to their own activities in the furtherance of the alleged scheme. It is further alleged that those acts were done at a time when the individual defendants knew, or had reason to know, that the business affairs of Hilton Hotels were in such condition that a substantial drop in the value of the shares of that corporation was imminent.

All letters of transmittal, notices and offers submitted to the shareholders in the two transactions are attached to the complaint as exhibits.

The complaint alleged that the individual defendants, in presenting the offers to purchase the stock above mentioned, concealed from the Corporation and the shareholders thereof the true reasons for making the offers, and that, with respect to both the purchase of the Hilton Hotels shares and the Hilton Credit shares, the individual defendants failed to disclose to the Hotels Corporation and its shareholders that they, the individual defendants, had engaged in activities designed artificially to inflate prices of the subject shares for the purpose of their scheme and plan to profit at the expense of the Hotels Corporation.

The complaint was in eleven counts, the first six of which were based upon the transaction for the purchase of the Hilton Hotels shares. Of those six counts, two of the counts charged certain of the defendants with the violation of the general corporation laws of the State of Delaware, while the other four counts charged all of certain of the individual defendants with the violation of Section 10(b) of the Securities and Exchange Act of 1934,⁵ Section 17(a) of the Securities Act of 1933,⁶ Section 9(a)

5. 15 U. S. C. 78j.

6. 15 U. S. C. 77q.

(4) and 9(e) of the Securities and Exchange Act of 1934⁷ and Section 12(2) of the Securities Act of 1933.⁸

Of the five counts relating to the transaction for the purchase of shares of Hilton Credit, one count charged certain of the defendants with violation of the general corporation laws of the State of Delaware, while the other four counts charged some, or all, of the individual defendants with the violation of Section 10(b) of the 1934 Act, Section 17(a) of the 1933 Act, Sections 9(a)(4) and 9(e) of the 1934 Act, and Section 12(2) of the 1933 Act.

With respect to the Hotels Corporation stock purchase, the complaint prayed for a judgment against the individual defendants for the damages sustained by the corporation because of their allegedly illegal acts, and that they make restitution to the corporation for its losses. The five counts related to the purchase of Hilton Credit shares prayed for a judgment against the individual defendants for the damages sustained by Hilton Hotels because of that transaction, and that the individual defendants be required to account to the Hotels Corporation for all profits, gains and benefits realized by them as a result of their allegedly illegal acts and breach of their fiduciary duty.

The complaint was signed by certain of plaintiff's attorneys, and was verified by the affidavit of plaintiff. On that affidavit plaintiff swore that certain of the allegations of the complaint were true. She verified a majority of the allegations of the complaint upon information and belief.

On February 25, 1964, after the complaint was filed, but prior to the filing of any answer thereto, the defendants, pursuant to an order of the court below, took the

7. 15 U. S. C. 78i.

8. 15 U. S. C. 771.

deposition of plaintiff. At that deposition the defendants' attorneys inquired of the plaintiff as to the basis for swearing that certain of the allegations were true. She replied to those questions that she "did not know" and "did not know anything about it." She was then questioned relative to the factual basis of a number of the specific allegations made on information and belief. In each instance she answered, in effect, that she didn't understand it and couldn't explain it, and that she did not know. Upon the stipulation of counsel, the general question was then asked as to whether plaintiff knew any facts at all upon which she based the allegations made on information and belief, to which she answered, "I don't know. I can't give you no facts because I don't understand it."

She identified her signature on a letter of protest mailed to the corporation over her name, but when shortly thereafter she was asked upon what basis she had alleged that she had made a protest to the corporation of the stock purchase offer, she replied, "I don't know" and "I don't know nothing about it." At one point in the deposition she replied, "I have no information because my son-in-law, [Irving Brilliant] I left it to him, and he was the one that knew all about it."

In response to questions from her own attorney she stated that she had turned the transmittal letter and the offer to purchase Hilton Hotels stock, and other letters relative to that transaction, over to Mr. Brilliant, who had brought the protest letter to her and asked her to sign it and that she had signed it. She further stated that Mr. Brilliant had brought her the complaint and explained it to her whereupon she had signed it. She further stated at one point that Brilliant had said that "He would like to take action" and that, "He said he would take care of it * * *. I left it to him."

On the same day, following the taking of plaintiff's deposition, the defendants served notice on plaintiff that they would, on the following day, February 26, 1964, move to dismiss the complaint on the ground that it was a sham pleading and on the further ground that the plaintiff, Dora Surowitz, was not a proper plaintiff.⁹ At the hearing on February 26, leave was given to the defendants to file plaintiff's deposition, and plaintiff was given fifteen days to file whatever documents she deemed appropriate in opposition to the motion to dismiss.

Within the fifteen days allowed, plaintiff filed the affidavits of Mr. Brilliant and of Walter J. Rockler, one of plaintiff's attorneys.

The affidavit of Brilliant stated that he had a legal education, but that he worked as a professional investment counselor; that, as of December, 1962, members of his immediate family owned more than 2350 shares of Hilton Hotels common stock; that he had purchased one hundred shares of Hilton Hotels stock for the plaintiff on August 1, 1957; that in December, 1962, plaintiff brought him the papers relating to the offer of Hilton Hotels to buy a part of its own stock, whereupon he informed her that he was studying the matter; that he conferred with Mr. Rockler after which he and Rockler reached the conclusion that the transaction was questionable and should be objected to; that Mr. Rockler prepared a letter of protest which plaintiff signed after the nature of its contents was explained to her by Brilliant; that he conducted investigations and research into the transaction and communicated with Mr. Rockler with respect thereto; that Hilton Hotels stock declined in market price in 1963

9. The latter ground, based upon the contention that plaintiff was not a shareholder contemporaneously with the transactions of which complaint is made, is obviously ill founded and was apparently abandoned by defendants in the court below.

and the corporation passed the 1963 dividend; that plaintiff asked him about that, whereupon he told her that Rockler was of the opinion that the officers and directors of the corporation had engaged in wrongful conduct and it might be wise to bring suit; that plaintiff then stated that she was willing to sue; that he received the complaint from Mr. Rockler, which he read and explained to plaintiff, and that he informed her that the charges contained in the complaint reflected the investigation made by himself and Rockler and that the same were soundly based; and that thereupon plaintiff signed and verified the complaint.

The affidavit of Mr. Rockler described in some detail the investigations undertaken by him and other attorneys working with him which led to his knowledge that the positive allegations of fact of the complaint were true, and that he had gained information upon which he believed that all other allegations of the complaint were true and well founded.

After argument upon defendants' motion to dismiss, and after reviewing plaintiff's deposition and the affidavits submitted to him, the trial judge entered an order on March 30, 1964, striking plaintiff's complaint.

In his memorandum order striking the complaint, the trial court found that the verification of plaintiff was false inasmuch as her deposition revealed that she had no knowledge of the facts which she had therein sworn to be true, and that she had lacked any information to support her verification on information and belief of the acts of misconduct and wrongdoing alleged in the complaint. The court therefore held that the verification of the complaint

was a nullity and inconsistent with the verification requirements of Rule 23(b).¹⁰ The court concluded that, in the absence of a motion for leave to substitute any other verification or to file an amended complaint, the suit must be dismissed. The court further held that the plaintiff's attorneys who had signed the complaint violated Rule 39 of the District Court for the Northern District of Illinois in that they had filed affidavits falsely stating that they knew of no agreement for the sharing of costs or the payment of plaintiff's expenses in this suit, as shown by a comparison of such affidavits with the statement contained in the Brilliant affidavit that certain members of his family had undertaken and would undertake to pay the major part of the costs and expenses of the plaintiff's suit.

This appeal is prosecuted to review that decision.

The last ground mentioned upon which the complaint was dismissed can be quickly disposed of. There is nothing in the Brilliant affidavit which indicates that Mr. Rockler or any other of plaintiff's attorneys were advised at the time when their Rule 39 affidavits were filed that Brilliant and other members of his family had agreed to bear a large part of the burden of expense connection with

10. In pertinent part, Rule 23(b) provides:

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains * * * and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees * * * such action as he desires * * *." F. R. C. P. 23(b), 28 U. S. C. A.

this suit.¹¹ There is thus absent any evidence that any of the three affidavits by plaintiff's attorneys stating that each knew of no payment or promise of payment of expenses was a false statement by any of the three attorneys. So far as the order of dismissal rests upon the determination that the attorneys had violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous. To the extent that the decision rests upon that finding, the record before us does not sustain it.

The determinative issue of this appeal deals with the proper interpretation of the provision of Rule 23(b) which requires that a complaint in a derivative cause of action must be verified.¹²

Before approaching that issue, we will first consider plaintiff's argument that Rule 23(b) could not be applied to this complaint inasmuch as eight of its eleven counts are based upon the federal securities acts. Thus the plaintiff argues, as to those eight counts, that the complaint cannot properly be construed as derivative because federal law is the jurisdictional basis thereof.

We certainly agree with the plaintiff's thesis that the policy of the federal securities laws is to protect investors, including the uninformed, the ignorant, and the gullible. However, the statement of that thesis begs the question which is here presented. We think it clear from an examination of the sections of the securities laws upon

11. The only relevant statement contained in the Brilliant affidavit is the following narrative of a conversation not in the presence of any of the attorneys:

"I told Mrs. Surowitz that there would be expenses involved in suing and that, since members of the family owned a substantial amount of Hilton stock it was reasonable to assume that the members of the family would be willing to pay a major part of the expenses."

12. Note 10, *supra*.

which the complaint is founded, in the light of the allegations of the complaint itself, that the counts of the complaint which are based upon federal law are wholly derivative.

Section 12 of the Securities Act of 1933, 15 U. S. C. 771, provides, in pertinent part, that any person who offers or sells a security in violation of certain provisions of the act "shall be liable to the person purchasing such security from him."¹³ The cause of action created by that section accrues only to the purchaser of securities sold in violation thereof. *Slavin v. Germantown Fire Ins. Co.*, 3 Cir., 174 F. 2d 799; *Cf.*, *MacClain v. Bules*, 8 Cir., 275 F. 2d 431.

Section 9 of the Securities and Exchange Act of 1934, 15 U. S. C. 78i, provides that a person who purchases or sells a security, the price of which was affected by certain manipulative practices proscribed by that section may recover damages from any person who willfully participated in such manipulative practices.¹⁴

Thus Section 9 of the 1934 Act, like Section 12 of the 1933 Act, creates a cause of action which accrues only

13. "Any person who [offers or sells a security in violation of certain provisions of this title] shall be liable to the person purchasing such security from him, who may sue * * * to recover the consideration paid for such security with interest thereon * * * upon the tender of such security, * * *." 15 U. S. C. 771.

14. Section 9 declares unlawful, among other acts, any act or practice done with a design to create an appearance of active trading of a security or to raise or depress the price of such security for the purpose of inducing the purchase or sale of such security by others. The section then provides, in part:

"(e) Any person who willfully participates in any act or transaction in violation [of this section], shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue * * * to recover the damages sustained as a result of any such act or transaction. * * *." 15 U. S. C. 78i.

to a purchaser or seller of securities, the price of which is affected by the manipulative practices therein proscribed.

Hilton Hotels, not plaintiff, is alleged to be the purchaser of the securities involved in this suit. It affirmatively appears that plaintiff did not sell any of the securities involved. Plaintiff is, therefore, without any personal right of action under either of those sections. Her interest is secondary and derivative, and the right alleged is the right of the corporation.

Section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. 78j, and Section 17(a) of the Securities Act of 1933, 15 U. S. C. 77q, each declare certain conduct to be unlawful without specifically authorizing actions for damages thereunder.¹⁵ It has been held that civil

15. Section 10 of the 1934 Act provides, in part:

"It shall be unlawful for any person, * * *, by the use of any means or instrumentality of interstate commerce or of the mails, * * *—

"(a) * * *—

"(b) To use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. 78j.

Section 17 of the 1933 Act provides in pertinent part:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U. S. C. 77q(a).

liability under each of those sections is implied by the language which makes the proscribed conduct unlawful. *Pfeffer v. Cressaty*, S. D. N. Y., 223 F. Supp. 756, and *Osborne v. Mallory*, S. D. N. Y., 86 F. Supp. 869; *C. f., Texas Continental Life Ins. Co. v. Bankers Bond Co.*, W. D. Ky., 187 F. Supp. 14; Compare, *Trussell v. United Underwriters, Ltd.*, D. Colo. 228 F. Supp. 757, all interpreting Section 17 of the 1933 Act; *E. g., Ellis v. Carter*, 9 Cir., 291 F. 2d 270, *Matheson v. Armbrust*, 9 Cir., 284 F. 2d 670, cert. denied 365 U. S. 870, *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195, cert. denied 365 U. S. 814, and *Fischman v. Raytheon Mfg. Co.*, 2 Cir., 188 F. 2d 783, applying Section 10(b) of the 1934 Act.

Where it has appeared that a corporation was the party injured by a violation of Section 10(b) of the 1934 Act, the courts have held that a shareholder of that corporation had standing to sue only on a derivative basis. *Birnbaum v. Newport Steel Corp.*, 2 Cir., 193 F. 2d 461, cert. denied 343 U. S. 956; *Slavin v. Germantown Fire Ins. Co.*, 3 Cir., 174 F. 2d 799, 805-806; *Kremer v. Selheimer*, E. D. Pa., 215 F. Supp. 549, 552.

Though we have found no authority treating this precise question under the provisions of Section 17(a) of the 1933 Act, the plain language of that Section convinces us that any cause of action arising under that Section is a right of the person injured by the acts and practices therein proscribed. When injury is alleged to have been incurred by a corporation, its shareholders can prosecute a suit only upon a derivative basis.

Assuming that each of the eight counts of this complaint based upon the federal statutes states a cause of action, each cause is that of Hilton Hotels, not a cause personal to plaintiff. Her interest and her right to file a suit are clearly secondary and derivative.

Gottesman v. General Motors Corp., S. D. N. Y., 28 F. R. D. 325, is not in point, but is of interest upon this question. The complaint in that case was a shareholder's derivative suit based upon a claim of alleged violation of the federal anti-trust laws. There it was argued that the provision of Rule 23(b) which requires that a plaintiff have been a shareholder at the time of the injury of which he complained could not be applied because the cause of action involved a federal question. That argument was rejected, the court saying that Rule 23(b) must be applied to a derivative suit whether jurisdiction of the court be based upon a federal question or upon diversity of citizenship.

Plaintiff's historical argument, that Rule 23(b) was designed only to prevent the creation of federal jurisdiction by collusion, is not persuasive. That rule is also designed to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit. *C. f.*, *Gottesman v. General Motors Corp.*, 28 F. R. D. 325, 326. Although such a suit does have secondary value to a shareholder plaintiff in the protection of the financial integrity of his investment in a corporation, the necessity for the contemporaneous protection of the corporation itself and of its officers and directors from ill-conceived, nuisance-value litigation is, at least, a consideration of equal value. *C. f.*, *Pioche Mines Consolidated, Inc. v. Dolman*, 9 Cir., 333 F. 2d 257, 265.

The cases cited by plaintiff, arising under Section 16(b) of the Securities and Exchange Act of 1934,¹⁶ are wholly inapposite.¹⁷ Those cases simply held that the contempo-

16. 15 U. S. C. 78p.

17. *Dottenheim v. Murchison*, 5 Cir., 227 F. 2d 737, cert. denied 351 U. S. 919; *Blau v. Mission Corp.*, 2 Cir., 212 F. 2d 77, cert. denied 347 U. S. 1016; *Pellegrino v. Nesbit*, 9 Cir., 203 F. 2d 463; *Benisch v. Cameron*, S. D. N. Y., 81 F. Supp. 882.

aneous ownership requirement of Rule 23(b) is not applicable to such litigation because of the express authorization contained in Section 16(b) for a suit by "the holder of any security."

Plaintiff's reliance upon *Borak v. J. I. Case*, 7 Cir., 317 F. 2d 838, aff'd. 84 S. Ct. 1555, is likewise wholly misplaced. In that case we dealt only with the application of the Wisconsin security for expense statutes to a cause of action arising under the provisions of the Securities and Exchange Act.¹⁸ No question under Rule 23(b) was presented.

We conclude that the principal issue presented upon this appeal is not affected by the fact that eight of the eleven counts rely upon federal law as a jurisdictional basis. Plaintiff's suit is derivative and is governed by the provisions of Rule 23(b).

The crucial issue presented by this appeal, namely, the interpretation of the verification requirement of Rule 23(b), is without guiding precedent. It is also an issue which opens the door to sophistries of argument, some of which tend more to cloud the issue than to elucidate it. In the portion of our opinion which follows, we have sought to avoid the invitation extended by the briefs to fish in the dark waters of speculation and have applied our best judgment to the decision of a close question of law.

We reject plaintiff's initial argument that the record before this court cannot support the finding that she was without relevant knowledge when she verified the complaint because the questions upon the deposition related to the plaintiff's knowledge on February 25, 1964, not to her knowledge approximately two and one-half months previously when she had verified the complaint.

18. That suit involved the provision of 15 U. S. C. 78n(a) and 78 aa.

We would agree that plaintiff's argument has verity insofar as the questions asked upon deposition related to technical, evidentiary facts bearing upon the allegations of the complaint. In most cases, the plaintiff in a shareholders derivative suit is merely the instrument for bringing the suit to the court. By hypothesis, most such plaintiffs would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance. Most of them, also, would have to rely upon the opinions and advice of trained counsellors for many of the principal allegations of such a complaint.

Reading the deposition most favorably to plaintiff, there is no question that she stated as positive fact essentially four things. These are that she was an owner of Hilton Hotels stock, that the stock missed a dividend, that she thought that her stock was not right, and that she had consulted Mr. Brilliant relative to the meaning of the written offer submitted to her for the purchase of a number of Hilton Hotels shares. In the same light, no one can successfully refute plaintiff's positive statements that she did not know who the individual defendants were, that she did not know of any wrongful acts which they had done, that she did not know of any facts upon which she had alleged that the individual defendants had caused the purchase offers to be made, that she knew nothing about any protest which she had made to the corporation, except for the fact that she had signed a letter shown to her, and that she did not understand the factual basis of her complaint.

It appears from the record that plaintiff is an immigrant woman who works as a seamstress and who has a limited education. It also appears that she has a very limited capacity for reading the English language. From such apparent facts, it must then be concluded that plaintiff is among the most unsophisticated of investors.

We think a sensible interpretation of the verification requirements of Rule 23(b), in the light of the realities of litigation of this nature, must relieve the plaintiff after two and one-half months from the necessity of recalling technical factual information which she received from trusted advisors and upon which she acted pursuant to their advice. On the other hand, we find it inconceivable that the instigator of a suit of this nature could fail to know the identity of the individual defendants as directors and officers of the corporation and to know in a general sense what wrongful acts she conceived to have been done which she has filed. We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant.

It has been held in the context of the bankruptcy statutes that there was no verification of a petition because it appeared upon a trial of the case that the petitioners had no knowledge of any of the acts of bankruptcy which they had alleged in their petition under oath. *In re Frank*, E. D. Pa., 234 Fed. 665, aff'd 3 Cir., 239 Fed. 709. We think the same principle applies under the provision of Rule 23(b).

Rule 23(b) is one of the few instances in which the federal rules require verification of pleadings. We think that that provision requires something more than the mere formality of recklessly swearing to the truth of matters not known. The derivative suit is a unique vehicle

of litigation. The holder of one share of stock who is disgruntled at some act of a corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel a plaintiff to begin such a suit with sufficient knowledge of facts and information to show by his verification that there is a substantial basis to support the complaint which he makes.

As we have indicated, we conceive that all but the most sophisticated investors must rely upon attorneys, or other advisors to supply a substantial part of the information upon which any such complaint rests. We think that the Rule would be satisfied by a verification of intricate factual and conclusory allegations in reliance upon such advice and information. But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint.¹⁹

There can be no question that that minimal requirement was not satisfied in this case. On the contrary, it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about. We must conclude that there was, in fact, no verification of this complaint.

19. Plaintiff argues that ample assurance against a frivolous suit is found in the requirement of Rule 11, F. R. C. P., 28 U. S. C. A., that an attorney certify by his signature to a complaint that it rests upon a sound basis. Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a mere semantic exercise in the drafting of its provisions. Had they intended the certification provision of Rule 11 to supersede the verification provision of Rule 23(b), we think that the latter provision would have been omitted. We think the intent was to impose a condition of added assurance in the narrow field to which 23(b) applies.

That conclusion cannot be altered by the fact that many of the material allegations of the complaint are obviously true and cannot be refuted. Nor can it be altered by the fact that plaintiff is a person having little education and, quite apparently, wholly lacking in sophistication in financial matters. Those limitations can't apologize for her affirmative statements, for example, that she knew of no facts upon which she alleged that the individual defendants had caused the stock purchase offers to be made, and that she did not know why she had alleged that those defendants had committed any of the unlawful acts alleged. These things she must have known to give legitimacy to the serious charges made against those individuals.

Neither *Murchison v. Kirby*, S. D. N. Y., 27 F. R. D. 14, nor *Freeman v. Kirby*, S. D. N. Y., 27 F. R. D. 395, which are cited by plaintiff, has any conceivable bearing upon the issue before us. Both of those cases arose under Rule 11, F. R. C. P., 28 U. S. C. A., and neither involved any question of the interpretation of Rule 23(b).²⁰

20. Because Murchison had stated, in answer to certain questions upon his 1800 page deposition, that he had no personal knowledge of certain of the facts alleged in his verified complaint, the defendants in a derivative suit moved to strike the complaint as a sham pleading because Murchison's attorneys had permitted him to verify facts of which he had no personal knowledge. It was not contended that Murchison lacked knowledge of the basic facts as to the official identity of the defendants and the theory of his cause of action. He stated upon his deposition that he had relied upon information supplied by his retained attorneys in verifying the truth of certain material allegations. The court denied the motion to strike, saying that it was not necessary for a plaintiff to have direct knowledge of all evidentiary details where it appears that his verification rests upon information supplied by attorneys expressly authorized to file the complaint. *Murchison v. Kirby*, S. D. N. Y., 27 F. R. D. 14, 18, 19, n. 10, n. 11. See also *Hoover v. Allen*, S. D. N. Y., 180 F. Supp. 263, 265.

A complaint based largely upon an attorney's copying part of the Murchison complaint, and filed in the name of a plaintiff who

No questions of fact were presented by the Brilliant and Rockler affidavits. Those affidavits reveal that substantial and diligent investigation by Brilliant, Rockler and others preceded the filing of this complaint. They would, in our opinion, completely refute the merit of any motion under Rule 11 directed against this complaint. Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant knowledge or information other than the fact of her stock ownership.

Brilliant does state in his affidavit that he read the complaint to plaintiff before she signed it, but it seems obvious from her deposition that she had no conception of the matters read. If the contention was that this was a sham pleading in the sense that it was without arguable foundation, these affidavits would, in our opinion, have a controlling bearing upon the disposition of the defendant's motion. A pleading may, however, be sham in respects other than the lack of an arguable foundation to sustain it. We think the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand.

The question whether the Rockler affidavit may serve as a verification for this complaint is not before us. There was no motion for a substitute verification in the agreed "to lend his name" to the suit was stricken as sham in *Freeman v. Kirby*, S. D. N. Y., 27 F. R. D. 395, 398. The court held that there was proof that the attorney was without any information upon which he could certify under Rule 11 that the complaint stated a good cause of action.

court below and no submission of any amendment to the complaint. We express no opinion upon the question whether verification of a stockholder derivative complaint by attorney would satisfy the requirements of Rule 23(b).²¹

The Court below had inherent power to dismiss this complaint because of plaintiff's non-compliance with the Rule. Rule 41(b), F. R. C. P., 28 U. S. C. A.; *Johnson v. Brandon Corp.*, 4 Cir., 183 F. 2d 444; *C. f., Meeker v. Rizley*, 10 Cir., 324 F. 2d 269, 271.

We have considered all arguments advanced by the plaintiff. We have considered the record in the light of plaintiff's limited grasp of the English language and the intricacies of corporate finance. We have considered the peculiar position of a plaintiff in a suit such as this as, principally, the instrument through which the judicial machinery is set in motion. It is not unreasonable to state as a minimum requirement that the plaintiff have general knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges. We conclude that any lesser requirement would make the verification provision farcical.

JUDGMENT AFFIRMED.

21. Where the foundation for a derivative complaint was based upon knowledge gained by plaintiff's attorney through his participation in proceedings for the dissolution of a corporation under the New York corporation laws, one court held that verification of such complaint by attorney satisfied the verification requirements of Rule 23(b). *Bosc v. 39 Broadway, Inc.*, S. D. N. Y., 80 F. Supp. 825. To some extent, the court relied upon a New York procedural rule which permitted pleadings to be verified by attorney if the client resided in a county other than that in which the attorney's office was located.

APPENDIX B.

STATUTORY PROVISIONS INVOLVED.

Securities Act of 1933 (15 U. S. C. Sec. 77a et seq.)

SEC. 12. Any person who—

* * * *

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

SEC. 17(a). It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Exchange Act of 1934 (15 U. S. C. Sec. 78a et seq.)

SEC. 9(a). It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in

its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

WILLIAM F. FRIEDMAN

Individual Defendant

Other than Name Change

WILLIAM F. FRIEDMAN

Individual Defendant

Other than Name Change

Other than Name Change

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Other than Name Change

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

**HILTON HOTELS CORPORATION, a corporation, CONRAD N.
HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY,
JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN,
HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK
FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM
D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERB-
ERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A.
GROVES, JOSEPH A. HARPER, BARRON HILTON AND
HILTON CREDIT CORPORATION, a corporation,**

Respondents.

OPPOSITION BRIEF OF INDIVIDUAL RESPONDENTS

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court
of the United States:*

Respondents pray that the Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

The petition should be denied for three basic reasons:

1. The Decision of the Court of Appeals Is Clearly and Necessarily Correct.

This derivative action was dismissed by the trial court because plaintiff failed to comply with the verification requirements of F.R.C.P. 23(b). Plaintiff filed a purported verification, but the uncontradicted testimony of the plaintiff herself established that the verification was false, and, therefore, a nullity. The decision of the Court of Appeals upholding the dismissal involves only an application to the undisputed facts of the self-evident propositions that parties to actions in the Federal courts must comply with the applicable Federal Rules of Civil Procedure and that failure to comply justifies dismissal.

2. The Decision of the Court of Appeals Is Not In Conflict With the Decision Of Any Other Court.

This case concerns the verification requirement of the Rule 23(b). The cases cited by petitioner relate to signature of counsel under Rule 11 or to the knowledge required of a witness. Nothing in these cases justifies plaintiff's filing of a false verification or plaintiff's failure to comply with Rule 23(b) of the Federal Rules of Civil Procedure. No conflict of decisions has been or could be shown.

3. The Decision of the Court of Appeals Will Not Discourage Either Shareholders' Derivative Actions In General Or Actions Under the Securities Acts In Particular.

Assuming arguendo a policy encouraging derivative actions or actions under the Securities Acts, there is nothing in the decision of the Court of Appeals which conflicts with such a policy. Plaintiff's action was dismissed because she filed a patently false affidavit and therefore failed to comply with the express requirements of the Federal Rules. Since the decision of the Court of Appeals is based upon the falseness of plaintiff's affidavit, the arguments in the petition amount to an outrageous and unsupported contention that the public policy of the Securities Acts cannot be fulfilled without encouraging the filing of false affidavits. Even the poorly educated and uninformed have the duty to tell the truth. In fact, the petition makes no showing of the necessity of nullifying Rule 23(b) in order to promote the policy of the Securities Acts.

There is nothing in the decision of the Court of Appeals which will discourage derivative actions. The decision requires only that such actions be truthfully verified. The Court has even reserved the question of whether a verification must be made personally by a plaintiff or whether it may be made by the plaintiff's attorney or agent. Since the entire petition is based upon the assumption that *personal verification* by a plaintiff is required, the Court of Appeals' reservation of this issue makes a mockery of petitioner's anguished cries concerning "literacy tests" and "barring as plaintiffs numerous uninformed and ill² educated stockholders" (Pet. 10, 17).

I.

THE DISMISSAL OF THE COMPLAINT WAS A PROPER AND INDEED NECESSARY MEASURE TO ENFORCE THE FEDERAL RULES. THE ONLY ALTERNATIVE IS A NULLIFICATION OF RULE 23(b).

The dismissal of the complaint by the trial court and the affirmance of that dismissal by the Court of Appeals rested on four propositions:

(1) Rule 23(b) FRCP required the complaint in this action to be verified;

(2) The uncontradicted testimony of the plaintiff on her deposition conclusively established that her verification was made without even the most elemental familiarity, knowledge, information *or* understanding concerning the subject matter of the complaint. Accordingly, the verification, in which plaintiff swore to familiarity with the complaint and to such knowledge and information, was indubitably false;

(3) Ignoring suggestions by the trial court, plaintiff insisted on standing upon the false verification;

(4) The trial court, confronted with this situation, properly dismissed the complaint pursuant to Rule 41(b). Under the circumstances, the dismissal was the only action consistent with the integrity and enforcement of the Federal Rules.

Obviously, the petition, if it is to challenge successfully the decisions of the District Court and the Court of Appeals, must destroy one or more of the four propositions stated above. Not only does the petition fail to come to grips with any of these propositions, but it also seeks to obscure the facts applicable to each. As the following discussion demonstrates, all four propositions and the decisions of the lower courts are correct.

A. Rule 23(b) Required the Complaint in This Action to be Verified.

Rule 23(b) unequivocally requires that in all "secondary" or derivative actions by shareholders to enforce corporate causes of action, "the complaint shall be verified by oath." The Rule applies to "all suits of a civil nature" in the United States District Courts, whether jurisdiction is based upon diversity of citizenship or upon the existence of a Federal question under statutes such as the Securities Acts. FRCP Rule 1. There is nothing in the Federal Securities Acts which excuses compliance with the verification requirement of Federal Rule 23(b).

The complaint in all of its Counts alleges derivative causes of action. This is expressly conceded in the petition (Pet. 2)* and is obvious from the complaint. Paragraph 1 of Count I of the complaint (which is incorporated by reference in each of the other Counts) states that:

"Plaintiff brings this action to enforce rights of the defendant Corporation, Hilton Hotels Corporation . . . " (A. 2)

All of the Counts of the complaint seek relief solely on behalf of the corporation. No relief is sought or could be sought for the plaintiff shareholder individually, apart from costs and attorneys' fees.

* The following abbreviations are used herein to designate the various appendices and briefs heretofore filed:

Petition for Certiorari (Pet.),

Appendices of Record filed in Court of Appeals as follows:

Appendix filed by plaintiff (A.).

Supplemental Appendix filed by defendants (Supp. A.),

Additional Appendix filed with plaintiff's Reply

Brief (Add'l. A.),

Opinion of Court of Appeals,

Appendix A to Petition (App. A.).

Plaintiff's counsel, in instituting this action, recognized the derivative character of the suit and the applicability of the verification requirement of Rule 23(b). The complaint was filed with a verification by Mrs. Surowitz, who swore to the correctness of all of the allegations on the basis of either personal knowledge or information and belief (A. 64).

The petition does not face up to the issue of whether the complaint was required to be verified.

At times the petition appears to rely upon the adequacy of counsel's compliance with the requirements for attorneys' signatures to the complaint under Rule 11. But the Rules specifically require that, in derivative actions, there must be *both* signature of counsel under Rule 11 and verification under Rule 23(b). In the face of these specific provisions, a holding that compliance with Rule 11 excused verification under Rule 23(b) would, in effect, repeal the provisions of the latter Rule. There can be no real dispute about the necessity of verification in this case.

B. Plaintiff's Testimony Conclusively Established That Her "Verification" Was Utterly and Completely False and Therefore Did Not Comply with Rule 23(b).

Plaintiff signed under oath, the following verification:

"Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing complaint by her attorneys subscribed and is familiar with the matters therein alleged; that as to the matters alleged in [certain specified paragraphs of the Complaint] said allegations are true and correct. That as to all other matters alleged in the above and foregoing Complaint, she makes said allegations on information and belief and believes them to be true."
(A. 64)

As the careful analysis by the Court of Appeals shows, plaintiff's own testimony on her deposition conclusively and unequivocally demonstrates the complete falsity of that verification. Mrs. Surowitz' knowledge and information concerning the lawsuit and the allegations of the complaint was limited to her name, her address, the fact that she owned stock in the Hilton Hotels Corporation, her conclusion that the stock "wasn't right", her receipt of the tender offer, her signature of a protest letter which she did not understand, and the fact of her status as a plaintiff in a suit about which she had no knowledge. She had not even the vaguest or most elemental conception of the serious charges made in the complaint. No questions of general application nor of the Securities Acts are presented. The sole question is whether her false affidavit constituted sufficient compliance with Rule 23(b). The answer is obvious. As the lower courts found, the false affidavit is a nullity.

At times, when the petition speaks of a plaintiff's cause of action depending upon her "skill in deposing" or states that "Mrs. Surowitz' crime is that she could not understand *all* that she was told" (Pet. 13, 18)*, plaintiff's counsel seem to indicate that they take issue with the conclusions of the lower courts with respect to the falsity of plaintiff's verification. However, the petition never squarely faces up to this issue.

In any event, the statements that dismissal was based upon Mrs. Surowitz' lack of "skill in deposing" or her failure to understand "all that she was told" are plain misstatements of the record, and misdescriptions of the decision of the Court of Appeals. It is equally inaccurate

* All emphasis herein is supplied unless otherwise stated.

to suggest, as does the petition, that the lower courts conditioned the maintenance of a shareholder's derivative action upon detailed knowledge and understanding of complicated financial transactions.

The Court of Appeals stated that most shareholder plaintiffs "would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance" and "would have to rely upon the opinions and advice of trained counsellors for many of the principal allegations of such a complaint." (App. A. 33). The Court also concluded that a "sensible interpretation" of Rule 23(b) "must relieve" plaintiffs "from the necessity of recalling technical factual information which [they] received from trusted advisers." (App. A. 34). The Court also concluded "we think that the Rule would be satisfied by a verification of intricate factual and conclusory allegations *in reliance upon such advice and information.*" (App. A. 35).

In the light of the undisputed facts of the instant case, however, the Court of Appeals concluded that "it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about" (App. A. 35) and that "plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." (App. A. 34). In fact, no other conclusions could reasonably be drawn from plaintiff's deposition. It would serve no useful purpose to repeat the detailed analysis of the deposition which appears in the opinion of the Court of Appeals. (App. A. 32-36). Suffice it to say that plaintiff's utter lack of information about the lawsuit is clearly demonstrated by:

- (1) Her affirmative statements that she did not know anything about any of the individual defendants nor about any wrongful acts allegedly committed by any of them,

and her affirmative statements that she had no knowledge, information or understanding concerning the nature of the repurchase transactions which were the basis of the lawsuit (A. 101, 105, 107);

(2) Her failure to supply any information whatever in response to detailed questions concerning a substantial number of the allegations of the complaint. All of her answers amounted to "I don't know" or "I don't understand" (A. 102-107);

(3) The stipulation of petitioner's counsel that Mrs. Surowitz would answer all questions about any of the remaining allegations of the complaint by a complete disavowal of any knowledge or information (A. 107).

The petition appears to argue that, even assuming a complete lack of information or understanding, the verification was not false or was false only in an "unusual sense." (Pet. 3). On the contrary, plaintiff's deposition showed the verification to be false in the most common and rudimentary sense of that term. It was false because plaintiff swore that she was *familiar* with the allegations of the complaint, whereas in fact she knew nothing about these allegations or about the subject matter of the complaint. It was false because she swore that certain allegations were *to her knowledge true and correct*, whereas in fact she knew no more than her name and address and the fact that she owned stock in Hilton Hotels Corporation. It was false because she swore that all the other allegations of the 97 page complaint were made *upon information and belief*, whereas in fact she had neither information nor understanding of the stock transactions described in the complaint or the charges made in the complaint sufficient to form a belief as to the truth of a single one of the allegations.

The issue is not whether the complaint states a meritorious cause of action or whether particular facts alleged in the complaint are true or false. The question is whether the essential verification itself was false, and Mrs. Surowitz' deposition leaves no doubt that it was.

Such a patently false verification cannot satisfy the requirements of Rule 23(b). Petitioner has cited no authority which holds or even suggests that such a sham verification is legally sufficient. Moreover, the petition does not explain how it would be possible to accept verifications like that of Mrs. Surowitz and still leave any vitality in Rule 23(b).

Petitioner's counsel place great emphasis upon the signature of counsel to the complaint (required by Rule 11), and upon the alleged factual correctness of the allegations of the complaint itself (as distinguished from the verification), but these arguments furnish no answer to the requirements of Rule 23(b).

To illustrate, a complaint in a non-derivative action in the Federal courts must have the signatures of counsel required by Rule 11. It must also state a claim for which relief may be granted or be subject to dismissal under Rule 12. Further, such a complaint may be disposed of by summary judgment, if affidavits demonstrate that there is no genuine issue as to any material fact.

Similarly, a complaint in a shareholders' derivative action in the Federal courts must be signed by counsel and must state a claim for which relief may be granted. It is also subject to disposition on a motion for summary judgment. But in such actions Rule 23(b) specifically imposes *the additional requirement* that the complaint be "verified by oath." It is here that the positions of the parties to this cause differ. The position of respondents, and

the decisions of the Trial Court and of the Court of Appeals gives this additional requirement of Rule 23 content and effect. The position of petitioner's counsel denies the requirement of verification any effect whatever.

If a derivative action is immune from dismissal under Rule 23(b) because the complaint has been properly signed by counsel under Rule 11, or because the factual allegations of the complaint have not been shown to be false and the action is therefore immune from summary judgment, the explicit verification requirement of Rule 23 is thereby nullified and, in effect, deleted from the Rules. Obviously, this cannot be a proper construction of the Rules. Yet it is the inevitable consequences of the acceptance of petitioner's position here.

The many policy arguments set forth in the petition, fallacious as they are (see Opinion of Court of Appeals, App. A. 27-28, 31-32, 34-35), are directed, not to a construction of the verification requirement, but rather to the complete abolition of that requirement and the amendment of Rule 23(b). They have no relevance to a case governed by the specific provisions of that Rule.

C. Petitioner's Counsel Persisted In Confronting the District Court With A Choice Between Nullification of Rule 23(b) and Dismissal. Under These Circumstances, Dismissal Was Proper and Indeed Unavoidable.

As is demonstrated by the discussion at pages 15-20, *infra*, petitioner's counsel ignored the suggestions of the trial court and refused even to attempt to substitute a proper verification. The trial judge thereupon took the only action available to enforce the Federal Rules—dismissal. Rule 41(b) specifically authorized dismissal on the ground of non-compliance with the Rules, and the trial

court is supported by the authorities cited by the Court of Appeals (A. 38). In fact, the general principle that persistent failure to comply with the Federal Rules justifies dismissal has been applied in a large number of cases. The respondents, in their brief in the Court of Appeals, cited some 31 cases in which Federal courts have dismissed derivative actions for failure to comply with one or the other of the requirements of Rule 23(b) (Deft.'s Br. 52-53). There can be no question, therefore, that the trial court acted properly in dismissing the complaint.

II.

THERE IS NO EVIDENCE THAT THE COURT OF APPEALS' DECISION WILL DISCOURAGE DERIVATIVE ACTIONS.

A. Any Shareholder Should Be Able to Satisfy the Requirements of Rule 23(b) As Interpreted By the Court of Appeals. No Conflict Between the Circuits Is Presented.

The petition is premised upon the assumption that the enforcement of Rule 23(b) by the Court of Appeals will substantially impair the effectiveness of shareholder derivative actions. But there is nothing in the petition or in the record in this case or in the history of derivative actions to support such an assumption. The Court of Appeals' reasonable, and indeed liberal, interpretation of the verification requirement of Rule 23(b) is summarized as follows:

“But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general

knowledge of the wrongful acts which he alleges as a foundation for his complaint." (App. A. 35).

The liberality of this interpretation is even clearer when considered in the light of the Court's repeated statements (quoted at p. 8 *supra*) that shareholder-verifiers may rely substantially upon information received from attorneys or other advisers and that a plaintiff need not recall technical factual information in order to satisfy Rule 23(b).

It is patently absurd to suggest that such a test will disqualify any potential shareholder plaintiffs. Any plaintiff who is not a mere puppet will have no problem in satisfying it. Other *bona fide* shareholders of Hilton Hotels Corporation may challenge the corporate transactions referred to in plaintiff's complaint, provided only that they file truthful verifications (if suit is brought in a Federal court or in the courts of a state which requires verification) and otherwise comply with applicable rules of court.

Petitioner's counsel have been unable to cite a single case in the long history of shareholder derivative litigation which would have been dismissed under the Rule as interpreted by the Court of Appeals. This is hardly a showing of any general impact or effect which would require the exercise of this Court's **supervisory authority**.

In fact, petitioner's citation of *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947) and *Murchison v. Kirby*, 27 F.R.D. 14 (S.D. N.Y. 1961) as factually similar and as in conflict with the decision of the Court of Appeals in the case at bar, is an accurate measure of the desperate character of petitioner's argument. The petition ignores the liberal standard of the Court of Appeals quoted above and confuses the *first-hand knowledge* required of a

witness with the knowledge, information and belief claimed to exist by *one who verifies*. There is nothing stated or suggested in either decision which would uphold Mrs. Surowitz's verification here.

In the *Koster* case, the issue was whether an action brought in the district in which the shareholder plaintiff resided could be dismissed on the basis of *forum non conveniens*. The dismissal was upheld. Even the most cursory examination of the case demonstrates that the discussion quoted by petitioner concerned the unimportance of the shareholder plaintiff's role *in the trial of the action*, particularly as a witness. The language quoted in the petition refers to the fact that a shareholder plaintiff may have no *first-hand knowledge* of the facts of the lawsuit and therefore may not be a competent witness, and may "make no showing of any knowledge by which his presence would help to make whatever case can be made on behalf of the corporation." 330 U.S. 518, 525. This obvious truth has no relation to the case at bar. This case was not dismissed because Mrs. Surowitz lacked first-hand knowledge or could not personally *testify* at trial to the truth of the allegations in the complaint. *It was dismissed because her verification was false* and because her name and signature was used by others to justify filing a derivative action. The *Koster* case has nothing to do with verification. It is simply false to state, as does the Petition, that *Koster* placed its stamp of approval upon verification by shareholder plaintiff with "the same mental state" as Mrs. Surowitz (Pet. 14).

Murchison v. Kirby involved an attack upon a shareholder plaintiff for lack of *first-hand knowledge* of the allegations of the complaint. Plaintiff Murchison testified, as quoted in the petition:

"My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this

thing. . . . I wasn't there . . . so my information is general." 27 F.R.D. 14, 19, n. 10.

The opinion in that case upheld the propriety of Murchison's reliance upon information furnished to him by his lawyers and other advisers, and rejected a contention that the suit should be dismissed as sham under Rule 11.

Again, this decision has no significance in this case. The Court of Appeals in its decision in the case at bar repeatedly emphasized that plaintiff-verifiers may rely upon information given to them by attorneys and other advisers. The report of that case shows affirmatively that Mr. Murchison had received extensive information and reports from his attorneys and that he was able to communicate such information in the course of his 1800 page deposition. A reading of the *Murchison* opinion compels the conclusion that Mr. Murchison readily satisfied the test stated by the Court of Appeals in this case. There is nothing in the opinion which suggests that his state of mind was anything like that of Mrs. Surowitz or that he had sworn to a false affidavit.

B. The Violation of Rule 23(b) Was Not Only Flagrant But Persistent. Petitioner's Counsel Ignored Repeated Suggestions That a Proper Verification Be Substituted.

The entire petition is based upon an assumption that derivative actions *must* be verified *personally* by *plaintiffs*. Counsel so state in paragraph 3 of their purported summary of the decision of the Court of Appeals. (Pet. 6). In fact, however, the Court of Appeals expressly reserved this very question, stating:

"We express no opinion upon the question whether verification of a stockholder derivative complaint by attorney would satisfy the requirements of Rule 23(b)." (App. A. 38).

It is hardly surprising that counsel for petitioner ignore this portion of the decision, for the sentence quoted above and the record in this case make a mockery of counsel's anguished cries about "closing the doors of the courts to poorly-educated and uninformed stockholders." (Pet. 17). It was counsel for petitioner, not the defendants or the lower courts, who insisted upon resting this case on Mrs. Surowitz' false affidavit. Counsel first made these matters critical by filing a complaint with a verification by the plaintiff which stated that she was familiar with the allegations, had knowledge of the truth of some, and information concerning the rest. When the falsity of this sworn statement was shown, no attempt was made to correct the defects. The record of the proceedings in the trial court shows the following:

1. When the motion to dismiss was first presented, counsel for defendants clearly stated that the motion was based in part on the falsity of the verification under Rule 23(b). (Supp. A. 6). The trial court gave petitioner's counsel fifteen days to file "such documents as her counsel might think appropriate in opposition to the motion." (Supp. A. 10). Petitioner's counsel did not take advantage of this opportunity to tender a substitute verification.

2. On argument on the motion to dismiss, the trial court repeatedly corrected the now familiar contention of petitioner's counsel that the court was discriminating against "poor and unsophisticated stockholders." The trial judge stated that the critical fact was the necessity that the verifier have sufficient knowledge and information to make a true verification. The court repeatedly suggested that a knowledgeable person should have verified the complaint, in fact stating at one point:

"I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, in-

duced her to sign it [the complaint] but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant [the financial adviser] who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

"It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does." (Supp. A. 13-14).

Later, when petitioner's counsel made one of his frequent references to the policy of the Securities Acts, the Court stated:

"Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

"You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name. It seems to me that would have been the simple way to do the thing properly." (Supp. A. 23).

But petitioner's counsel made no effort whatever to respond to the trial court's suggestions that they tender a proper verification. There was no motion to amend the complaint or to file a substitute verification. In fact, petitioner's counsel never suggested or intimated that they would retreat from their insistence upon standing on Mrs. Surowitz' "verification."

For the first time on appeal, petitioner's counsel suggested that the affidavit filed by Mr. Walter J. Rockler (one of petitioner's counsel) in opposition to the motion to dismiss should be treated as some kind of substituted or additional verification. This suggestion was made obliquely even on appeal, and this oblique approach is continued by the incidental reference to the matter on page 6 of the petition.

In fact, it is clear that this Rockler affidavit was never submitted to the trial court as a verification, that it was not intended as a verification, that it could not serve as a verification, and that the entire argument is an afterthought of counsel on appeal.

If, during the pendency of this matter in the trial court, petitioner's counsel considered the Rockler affidavit as a verification, they kept their position a closely guarded secret. There was no motion to have the court consider the affidavit as a verification. In extended arguments before the court concerning the sufficiency of Mrs. Surowitz' verification, counsel never suggested that the Rockler affidavit was a verification or was even pertinent to the 23(b) issue.

The findings of fact adopted by the trial court include the following significant statement:

"34. Plaintiff's counsel have not asked for leave to file a substitute verification or an amended complaint." (A. 156)

Paragraph 5 of the Court's conclusions of law stated:

"5. The verification of this complaint is false and sham and the complaint must be stricken. Since the plaintiff has not sought leave to substitute any other verification or filed an amended complaint, the action will be dismissed." (A. 157)

Prior to the entry of the findings of fact and conclusions of law, petitioner's counsel attacked them in oral argument on a large number of grounds. However, counsel never suggested any inaccuracy in the above quoted finding and conclusion with respect to the absence of any substitute verification.

The notion of the Rockler affidavit as a verification first appeared in this case in a vague reference in petitioner's brief in the Court of Appeals, which stated that it would involve "no unwarranted stretching of Rule 23(b) to treat Mr. Rockler's affidavit as a verification of the complaint." (Pl. Br. 54)

The language of the Rockler affidavit itself specifically limits the scope of the document in such a way as to preclude its operation as a verification. Paragraph 26 of the affidavit states:

"This affidavit is made necessary by defendants' motion of February 26, 1964 and the proceedings in Court on that date; it is filed solely for the purpose of refuting incorrect and misleading implications therein. Counsel and the plaintiff do not in any respect agree to waive and expressly reserve, the attorney-client privilege and the confidential and privileged character of counsel's work products." (A. 143)

Therefore, by reason of the deliberate choice of the petitioner's own counsel, the sufficiency of the complaint in this case has been made to depend upon the Surowitz verification, which is patently false. As the Court of Appeals properly held, the question of the propriety of a verification by an attorney or agent of the plaintiff is not presented here. Nothing in the opinion of the Court of Appeals prejudices that issue in the event that it should arise in subsequent derivative actions. And, of course, failure to demonstrate that a *personal* verification by the

plaintiff is required, destroys petitioner's entire argument concerning the alleged effect of the Court of Appeals decision on derivative actions.

CONCLUSION.

The record demonstrates that the dismissal of petitioner's complaint was a proper measure to preserve the integrity of the Federal Rules of Civil Procedure. The case does not involve issues which will have any broad impact upon derivative actions generally. The decision below is not in conflict with the decision of any other court. Consequently, the petition states no basis for the granting of the writ of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161.

DORA SUROWITZ, *Petitioner,*

vs.

HILTON HOTELS CORPORATION, *et al., Respondents.*

BRIEF FOR RESPONDENT HILTON HOTELS CORPORATION IN OPPOSITION TO CERTIORARI.

INTRODUCTION.

We oppose the petition for certiorari. The decision below is clearly correct, there is no conflict among circuits, and the case has no import whatsoever beyond its peculiar, limited and non-recurring facts.

The petition strives for the impression that the courts below ruled against Mrs. Surowitz because she was a foreign-born and unsophisticated person with little formal education. The record reveals, however, that the case was dismissed solely because the complaint was falsely verified in violation of Rule 23(b). Petitioner steadfastly refused the District Court's several invitations to cure the defect by amendment or otherwise; instead, petitioner insisted upon attempting to establish that Rule 23 (b) does not require a truthful oath. Having failed, petitioner should not seek review here by subtly insinuating that the courts below were prejudiced against unschooled litigants.

STATEMENT OF FACTS.

The complaint, although needlessly voluminous, accuses the individual defendants of the simple fraud of selling their private stock holdings to the Hilton Hotels Corporation at an artificially inflated price (C. A. App. 1-63). The complaint was "verified" by the petitioner upon personal knowledge, information and belief; she specifically swore of her own knowledge that allegations in thirty-three separate paragraphs were true and that all the remaining allegations were true upon her information and belief (C. A. App. 64).

Petitioner's deposition was taken shortly after the complaint was filed (C. A. App. 94); she testified that she had neither personal knowledge nor information and belief concerning *any* of the accusatory allegations of the complaint (C. A. App. 101-13). Petitioner's sworn testimony reveals she did not know whom she was suing, what misconduct she was charging nor what relief she was seeking (C. A. App. 101-13). The District Court specifically found that petitioner's disclaimer of any information or knowledge about her sworn complaint "was not caused by the use of technical or legal language in the questions or by her failure to understand what was being asked," and that her counsel had so conceded (C. A. App. 153-54).

The Court of Appeals thus characterized the petitioner's deposition testimony (Petn. App. 34-35):

"We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

"We can only conclude, as did the court below, that

plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant."

The petition does not seriously contest this finding (Petr. 6-7, 9-10, 12-13, 17).

Petitioner testified that she signed the complaint at the request of her son-in-law, Irving Brilliant; Brilliant told her *he* "would like to take action" and asked *her* to sign the complaint; she in fact testified at the deposition that Brilliant "was the one that knew all about it" (C. A. App. 96, 107, 110). Brilliant's affidavit (filed in the District Court to explain the plaintiff's verification) admits that he made the arrangements concerning financing of the suit, and even engaged petitioner's counsel (C. A. App. 120-23). Brilliant also has long been a legal owner of Hilton stock, but does not care to be a party to this suit (C. A. App. 124). The Court of Appeals concluded (Petr. App. 35):

"[I]t affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about."

After the deposition, the defendants moved for dismissal; the District Court held several hearings concerning the matter. The Court found that the plaintiff's verification of the complaint as required by Rule 23(b) was "false and sham" and therefore a nullity (C. A. App. 157). Although the petition for certiorari states (at page 6) that "the Court refused to accept additional verification by counsel," the record shows that the District Court repeatedly gave counsel opportunity to amend the verification, to substitute another verification, or to add or substitute another party plaintiff (C. A. App. 156-57; C. A. Supp. App. 10, 13-14, 23). The action was dismissed only after plaintiff's counsel made it plain that they would not amend and instead insisted on a ruling upon the complaint as originally verified (C. A. App. 156-57).

REASONS FOR DENYING THE WRIT.

I. This Case Is Sui Generis and Its Facts and Holding Do Not Merit Review by This Court.

We submit that this case is patently not "certworthy."

The record shows a bizarre and almost incredible set of circumstances that have never arisen before and in all likelihood will never arise again. The petitioner swore, of her knowledge and upon information and belief, to the truth of a complaint of which she was totally incognizant (Petr. App. 34); no plaintiff could conceivably have been less informed concerning her complaint, the lawsuit, the defendants, or what she was doing in court.

Nor do the oddities of the case stop with petitioner's manifest false swearing. Once petitioner's deposition revealed that she was the plaintiff in name only, and had neither knowledge nor control of the suit, the District Court gave petitioner's counsel the fullest opportunity to cure the defect by: (1) amending the verification, (2) amending the complaint, or (3) joining or substituting another party as plaintiff (C. A. App. 156-57, C. A. Supp. App. 10, 13-14, 23).

Instead of choosing any of these alternatives, or even a combination of the three, petitioner stood on the complaint and asked the District Court to hold that a false verification satisfies Rule 23 (b) (C. A. App. 156-57, Petr. 6). Petitioner's refusal to amend or do anything to cure the defect is the more inexplicable in light of the fact that, as the record shows, Mrs. Surowitz' son-in-law Brilliant—who conceived the suit and is arranging its financing—had full standing to join as plaintiff (C. A. App. 107, 110, 120-24, 154-55).

In sum, petitioner preferred to tender to the District Court and to the Court of Appeals the question whether

a false verification satisfies Rule 23(b), instead of easily eliminating the question and proceeding to the merits. Petitioner is still pursuing that identical quest here; this Court is now implored that the decision below rejecting a false oath will have a drastic impact upon the investing community and the gullible public¹ (Petn. 7-10). Petitioner's plaint is without substance.

This Court has often admonished that it will only grant certiorari to hear cases of general importance and upon issues that are unavoidably presented by the nature of the case and position of the parties; the questions thus reviewed must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74. See also *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393; *Mangum Import Co. v. Coty*, 262 U. S. 159, 163; Supreme Court Rule 19. Cf., *Duncan v. California*, 366 U. S. 417; *Williams v. Zuckert*, 371 U. S. 531; *Smith v. Butler*, 366 U. S. 161. The petitioner here cynically elected to stand upon an easily curable defect of pleading in the face of the District Judge's elaborate precautions to afford every opportunity to amend (C. A. App. 156-57; C. A. Supp. App. 10, 13-14, 23). We believe this Court should not further indulge the petitioner by granting still a third hearing on the self-answering question whether a false verification satisfies Rule 23 (b).

1. The petition cites *Gagnon v. Buchanan*, No. 65-C-189, N. D. Ill., April 19, 1965, as a decision heralding the instant case as a "landmark" and "applaud[ing] new technical devices for dismissing good causes of action, *without considering the merits*" (Petn. 10; emphasis in original). The record in the *Gagnon* case belies petitioner's claim; that case involved a derivative suit in which the plaintiff evinced full knowledge and information about her complaint at deposition. Although the instant decision was cited by the defendants there, the District Judge based the dismissal of that suit "*strictly on its merits*" (Transcript of Proceedings, p. 9, April 15, 1965; emphasis added).

There is likewise no merit in petitioner's claim that the decision below will hamper private securities law enforcement (Petn. 2-3, 7-10, 17-18). The *sui generis* nature of this case itself rejects such a contention. Moreover, and equally significant, the infirmity of the complaint is *not* because of any securities law provision; verification is required by Rule 23(b) in *all* derivative suits, whether the action be statutory or at common law. Petitioner does not claim *she* was defrauded by any securities transaction, but quite the contrary, sues derivatively and therefore as a fiduciary. As this Court pointed out in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 549:

"A stockholder who brings suit on a cause of action derived from the corporation *assumes a position, not technically as a trustee perhaps, but one of a fiduciary character*. . . . The interests of all in the redress of the wrongs are taken into his hands, *dependent upon his diligence, wisdom and integrity*." (Emphasis added.)

The Court further noted in *Cohen*, at 548-50, that the derivative suit has a long and inglorious history of abuse that Rule 23(b) was expressly designed to curb. See also Wood, *Survey and Report Regarding Stockholders' Derivative Suits*, pp. 58, 60-61 (1944); *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F. 2d 257, 265 (9th Cir.); *Gottesman v. General Motors Corp.*, 28 F.R.D. 325, 326 (S.D.N.Y.). Cf. *In re Frank*, 234 Fed. 665 (E.D. Pa.), *aff'd* 239 Fed. 709 (3rd Cir.).²

2. In the *Frank* case, a bankruptcy suit, the court said of false oaths (234 Fed. at 666-67):

"The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. . . . Thus irreparable damage may result from an honest mistake. . . . [C]reditors may [not] invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out acts of bankruptcy without even

The petition, however, argues (at page 12) that the decision below neither reaches nor corrects "a single one of the evils toward which Rule 23(b) is directed." We submit that the exact opposite is true; giving full force and vitality to the verification requirement is peculiarly well suited to preventing derivative suit abuses. A truthful verification assures that derivative plaintiffs possess the knowledge and good faith belief necessary to discharge their fiduciary duties; it also assures that the gullible will not be duped into loaning their names to persons who wish to sue but remain in the background—the precise abuse that the Court below found here (Petn. App. 35). Finally, requiring a meaningful verification discourages the filing of derivative suits that are motivated by reasons other than the redress of corporate wrongs. See *Cohen, supra*, 337 U. S. 541, 548-50; 4 Thompson, *Corporations*, § 4571 (1st ed. 1895); *Home Fire Ins. Co. v. Barber*, 67 Neb. 604, 93 N. W. 1024, 1029.

We submit that the petition presents neither a novel nor far-reaching question for this Court; the impact of the case is limited to its own narrow, unusual and uninspiring facts.

II. There Is No Conflict of Decisions.

The petition curiously contends that the decision below is in direct *conflict* with prior cases (Petn. 13-17) while at the same time urging that the case is completely *novel* (Petn. at 11-13). The conflict is as non-existent as the case is insignificant.

Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518 (discussed in Petn. at 13-14) was a *forum non conveniens* case; the sole question was whether the trial should be held in New York, where the plaintiff resided, or in Illinois, the defendant's place of business. In holding that

the 'formality' of . . . making oath to the petition, and where the notary public falsely certifies that oath was made before him."

Illinois was the proper forum, the court noted that the plaintiff had little potential value as a *witness*, and described such a plaintiff as often being a mere "phantom" in a derivative suit. 330 U. S. at 523-26. Petitioner here seizes upon the word "phantom" as though it somehow exonerates her false verification. However, in *Koster*, the Court specifically noted that, "although a plaintiff's own interest may be small," he may sue on behalf of other shareholders *only* "if the conditions laid down by Rule 23 . . . are complied with. . . ." 330 U. S. at 523-24.³

Petitioner's reliance on *Murchison v. Kirby*, 27 F. R. D. 14 (S. D. N. Y.) (Petn. 15-16) and *Freeman v. Kirby*, 27 F. R. D. 395 (S. D. N. Y.) (Petn. 15-17), also is misplaced. Both cases involved certification by counsel under Rule 11, F. R. C. P., and had nothing to do with verification by the plaintiff under Rule 23(b). Petitioner apparently believes that Rule 11 is a sufficient safeguard against abusive or frivolous derivative suits, without also requiring verification by the plaintiff. But, as the Court below tersely noted (Petn. App. 35):

"Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a semantic exercise in drafting its provisions."

In *Murchison*, *supra*, the plaintiff was fully informed of the basic grievances alleged in his complaint (unlike petitioner here); Rule 23(b) was not remotely in issue. *Freeman v. Kirby*, *supra*, not only fails to support the petitioner's argument, but we think directly refutes it. The plaintiff there knew nothing about the allegations of the complaint and (like petitioner here) had done nothing more than "lend his name" to those who had instigated the

3. The lower courts have rejected the petition's tortured misreading of the *Koster* "phantom plaintiff" dictum. See, e.g., *Freeman v. Kirby*, 27 F. R. D. 395, 399.

action. The court struck the complaint, saying (27 F. R. D. at 399):

"If an attorney's signature to a pleading is to be more than a hollow gesture he must do more than *obtain a person willing to lend his name as a plaintiff*; especially so where, as here, *the complacent plaintiff is without knowledge, is content to act the role without reading the complaint*, and expects to be paid for his time. An attorney's certification under such circumstances runs flagrantly afoul of the purpose of the rule." (Emphasis added.)

Thus, according to petitioner's own cited authority, Rule 11 not only fails to save the complaint but provides another reason to sustain its dismissal.

We submit that the petitioner's laborious search for a "conflict" of decisions was a vain exercise; the decision below is correct and in complete harmony with the letter, spirit and judicial gloss of Rule 23(b).

CONCLUSION.

For the foregoing reasons, we urge that the writ be denied.

Respectfully submitted,

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NOV 2 62

JOHN F. DAVIS

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161

DORA SUROWITZ, Individually and on behalf of all other
similarly situated shareholders of HILTON HOTELS
CORPORATION,

vs.

Petitioner,

HILTON HOTELS CORPORATION, a corporation, CON-
RAD N. HILTON, ROBERT P. WILLIFORD, ROBERT
J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLI-
SON, HENRY CROWN, HORACE C. FLANIGAN,
BENNO M. BECHOLD, Y. FRANK FREEMAN, WIL-
LARD W. KEITH, LAWRENCE STERN, SAM D.
YOUNG, FRITZ B. BURNS, VERNON HERNDON,
HERBERT C. BLUNCK, CHARLES L. FLETCHER,
ROBERT A. GROVES, JOSEPH A. HARPER, BAR-
RON HILTON and HILTON CREDIT CORPORATION,
a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161.

DORA SUROWITZ, Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION,

Peti. ner.

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHOLD, Y. FRANK FREEMAN, WILFARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARON HILTON and HILTON CREDIT CORPORATION, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 342 F. 2d 596; it is reprinted at pages 221-39 of the Transcript of Record (hereinafter designated as "R"). The findings

of fact and conclusions of law of the District Court, upon which the cause was dismissed, are reprinted at pages 145-58 of the Transcript of Record; these have not been reported.

JUDGMENT.

The judgment of the Court of Appeals was entered on March 11, 1965 (R. 239-40). The petition for a writ of certiorari was filed on May 20, 1965 and granted on October 11, 1965. The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

Petitioner filed a derivative suit in the United States District Court for the Northern District of Illinois, acting as a shareholder on behalf of Hilton Hotels Corporation. She alleged that officers and directors of the Corporation had engaged in numerous violations of the Federal Securities Acts and Delaware corporation law. Petitioner's suit was dismissed with prejudice on the ground that, because of her lack of knowledge and understanding of the basis of the suit, her verification under Rule 23(b) of the Federal Rules was false and a nullity. The Court of Appeals affirmed.

The questions presented are—

1. In the light of the policy of the Federal Securities Acts to protect the ignorant and the unknowledgeable, may a complaint charging serious violations of those laws be dismissed because the plaintiff-stockholder in a derivative suit is ignorant and unknowledgeable?
2. Is a verification on information and belief under Rule 23(b) false because the plaintiff is unable to testify concerning the basis or theory of the suit or the positions and activities of the individual defendants?

3. If the verification is false in the unusual sense that the Court of Appeals found it to be, is a motion to dismiss the suit sustainable where the record discloses that the suit is well-founded or at least that substantial triable issues remain to be decided, and where it contains an affidavit under oath by counsel attesting that the allegations are true?

4. If the verification is in any sense false, is dismissal of a derivative suit for failure to comply with the Rules, as specified in Rule 41(b), an appropriate or proper remedy?

STATUTES INVOLVED.

The statutes involved are Section 10(b) and Sections 9(a) and (e) of the Securities and Exchange Act of 1934 (15 U. S. C. 78j, 78i), and Sections 17(a) and 12(2) of the Securities Act of 1933 (15 U. S. C. 77q, 77l). These statutes are reprinted in Appendix A, pages 55-57 *infra*. The case also involves the construction of Rules 11, 23(b), and 41(b) of the Federal Rules of Civil Procedure, which are reprinted in Appendix B, pages 58-59 *infra*.

STATEMENT OF THE CASE.

This suit was filed by Dora Surowitz, a shareholder in Hilton Hotels Corporation, on behalf of herself and other shareholders, charging that the officers and directors of the Corporation had defrauded it of large sums of money, contrary to their fiduciary obligations and in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Delaware General Corporation Law (R. 1-88).

Prior to pleading, defendants took the deposition of Petitioner (R. 94-114). Relying upon that deposition, they moved to dismiss on two specific grounds: (1) that

the complaint was a sham pleading; and (2) that the Petitioner was not a proper party plaintiff (R. 117-18). The District Court, without hearing evidence but having before it the affidavits filed by the parties, granted defendants' motion and dismissed the cause on the ground that Petitioner's verification under Rule 23(b) was false and sham. The Court of Appeals affirmed.

The Complaint.

The complaint consists of eleven counts. Six counts relate to an offer and purchase by the Hilton Hotels Corporation of 300,000 shares of its own common stock. The other five relate to an offer and purchase by the Hilton Hotels Corporation of 1,058,997 shares of Hilton Credit Corporation stock.

Allegations Relating to the Purchase of 300,000 Shares of Hotels Corporation Stock.

The essential facts pleaded in Counts I-VI inclusive are as follows:

In December 1962 and January 1963, the individual defendants, as the officers and directors controlling the Hotels Corporation, caused the Corporation to mail certain documents to its shareholders throughout the country, whereby the Corporation, for a limited period of time and under certain conditions, offered to purchase 300,000 shares of its outstanding \$2.50 par value common stock at a price or prices, to be chosen by each stockholder, between \$28.125 and \$29.50 per share (R. 4-5). These documents were attached to the complaint as Exhibits A-D inclusive (R. 65-79).

The individual defendants stated in the offer of December 17, 1962 (Exhibit B, R. 67-71) the reason for making the proposal: "The purpose of Hilton in making this offer

is to repurchase the Common Stock of this Corporation equal to the number of shares heretofore issued in connection with the acquisition of certain properties, which properties are no longer owned by the corporation" (R. 5, 68). This explanation was false and misleading.

The individual defendants were in fact engaged in a deceptive plan to make it possible for Conrad N. Hilton, Henry Crown, and other officers and directors to dispose of their shares in the Corporation at prices more favorable than they could have obtained on the market (R. 6).¹ In so doing, they concealed from the Hotels Corporation and its stockholders the true purpose of the offer to purchase and made it appear that it was to the Corporation's advantage to effect the purchase, when in fact it was contrary to the interests of the Corporation (R. 6-7).²

Further, the individual defendants represented that the "current market price" of the Hotels Corporation common stock as of the date preceding the date of the offer was

1. Officers and directors who sold stock to the Corporation pursuant to the tender offer, and the number of shares they sold, are as follows (R. 11):

| Name | Number of Shares |
|---------------------------|------------------|
| Conrad N. Hilton | 85,847 |
| Sam D. Young | 353 |
| Vernon Herndon | 1,147 |
| Herbert C. Blunck | 393 |
| Charles L. Fletcher | 4,100 |
| Robert A. Groves | 6,000 |
| Joseph A. Harper | 2,150 |

2. The effect of the purchase was to reduce working capital by approximately \$8,564,000 at a time when the Corporation's debts and commitments were increasing. For example, by the end of 1962, long-term debts had increased by more than \$50,000,000 over and above the amount of such obligations at the end of 1961, investments had increased by nearly the same amount, and guarantees had been issued on various transactions which exposed the Corporation to possible liabilities in excess of \$20,000,000. In addition, by the end of 1962, the Corporation's current assets had decreased by \$9,500,000, compared with year-end 1961, while current liabilities had increased by more than \$2,500,000 (R. 6-7).

\$28.125. This representation was misleading in that the defendants failed to disclose that they had engaged in activity designed to inflate the price of the stock, in order to achieve, temporarily, a price on the market at the lower end of the scale of prices they proposed to use for the purpose of their plan (R. 8). They did not disclose, moreover, that financial information available to them as officers and directors made it apparent that the earnings of the Hotels Corporation were declining and that the market price of its shares was therefore likely to fall (R. 9).³

The notice of January 7, 1963 stated that defendant Conrad N. Hilton, although entitled to offer more than ten percent of his stockholdings, would offer only ten percent, namely, 85,847 shares. In fact, the 85,847 shares sold by Mr. Hilton were in excess of ten percent of his holdings on January 7, 1963. The statement was further false and misleading in that it failed to disclose that Conrad N. Hilton had agreed to purchase over 101,000 shares from defendant Henry Crown and Crown's related family interests. Failure to disclose this arrangement helped to conceal the extent to which the plan and its implementation were intended to inure to the benefit of defendant Henry Crown and his family (R. 10).

As a result of their scheme, and its carrying out pursuant to false and misleading representations and actions, the individual defendants caused the Hotels Corporation to purchase 300,000 shares of its common stock at a total price in excess of \$8,500,000; at least 101,650 shares were purchased from the officers and directors of the Hotels Corporation (R. 11-12).

On the basis of these facts, Petitioner charged, in Counts

3. Operating profits for 1962 were less than 80% of operating profits for the preceding year and were the lowest since 1954. Profits for the first quarter of 1963 were approximately 40% below profits for the same period in 1962.

I through IV, respectively, that the individual defendants were guilty of violating (1) Section 10(b) of the Securities Exchange Act of 1934 and the rules promulgated thereunder (R. 14-15); (2) Section 17(a) of the Securities Act of 1933 (R. 15-16); (3) Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934 (R. 17-18; 21-23); and (4) Section 12(2) of the Securities Act of 1933 (R. 23-24; 30-31). Jurisdiction of these counts was conferred by Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934. Count V charged certain of the defendants with violating the General Corporation Law of the State of Delaware (Title 8 of the Delaware Code) (R. 31-33). Finally, Count VI charged certain of the defendants with violating Section 244 of the General Corporation Law of the State of Delaware, by causing a reduction in the capital of the Hotels Corporation without adhering to many of the specific requirements of that section (R. 34-38).

Allegations Relating to the Purchase of Shares of Credit Corporation Stock.

The essential facts pleaded in Counts VII to XI inclusive are as follows:

At all relevant times, a majority of the Board of Directors of the Credit Corporation has consisted of officers and directors of the Hotels Corporation (R. 38-39). In January 1963, the individual defendants, as the officers and directors having control over both corporations, with the approval and assistance of the Credit Corporation, caused a "Letter of Transmittal" and an "Offer" to be mailed by the Hotels Corporation to the shareholders of the Credit Corporation, whereby the Hotels Corporation offered to purchase 1,390,706 shares of the Credit Corporation's outstanding common stock at a price of \$3.25 per share (R. 40-41). These documents are, respectively, Exhibits E

and F attached to the complaint (R. 79-88). The individual defendants caused the Hotels Corporation to state, in the Letter of Transmittal of January 15, 1963 (Exhibit E, R. 79-84), the reasons for the offer (R. 41-42):

As you know, Hilton Credit is obligated on notes to various banks in the aggregate amount of \$12,150,000, which mature under their respective terms on February 28, 1963. Under the terms of an Extension Agreement dated February 9, 1962 with said banks, Hilton Credit has the option to extend the maturities of said notes to February 28, 1964, provided, among other things, that the \$5,000,000 Subordinated Notes, due March 1, 1963, have been extended to a date not earlier than March 1, 1964. Hilton Hotels holds \$1,900,000 of said Subordinated Notes and has agreed to extend the maturity of the same until March 1, 1964 if all of the holders of said Subordinated Notes similarly agree. Although all of the holders of such Subordinated Notes have not agreed to extend their maturity as yet, it is anticipated that said holders will so agree to extend the maturity of the Subordinated Notes until March 1, 1964. Accordingly, it is anticipated that the maturities of the bank loans will be extended to February 28, 1964. There is no provision for the extension of the bank loans or the Subordinated Notes after February 28, 1964 and March 1, 1964, respectively. As a result, Hilton feels that it may be required to take a major role in any refinancing of such indebtedness.

Under the circumstances, the Board of Directors of Hilton has authorized the making of an offer to Hilton Credit Stockholders to purchase 80% of the outstanding shares of Common Stock of Hilton Credit, including the shares already owned by Hilton, for \$3.25 per share upon the terms and conditions set forth in the enclosed formal offer. Hilton has no intention of merging with Hilton Credit.

This explanation was false and misleading. These defendants were engaged in a deceptive plan to make it possible

for defendants Conrad N. Hilton, Henry Crown, Barron Hilton, and other officers and directors of the two corporations to dispose of shares in the Credit Corporation at a price more favorable than they could obtain on the market (R. 42-43). They therefore concealed from the Hotels Corporation and its stockholders the true purpose of the offer to purchase and made it appear that it was to the Hotels Corporation's advantage to purchase the Credit Corporation's shares, when in fact the purchase was contrary to the interests of the Hotels Corporation (R. 43).⁴

The individual defendants represented that on January 10, 1963 the market price of Credit Corporation stock was between \$3.125 and \$3.50 per share. This representation was misleading in that the defendants failed to disclose that they had engaged in activity designed artificially to inflate the price for the purposes of their scheme and plan (R. 44).

The proposal in the letter of January 15, 1963 (Exhibit E, R. 79-84) stated that the Hotels Corporation had been authorized to purchase 80 percent of the outstanding shares of Credit Corporation.⁵ Nonetheless, the Hotels Corporation was caused by the individual defendants to purchase a lesser amount of shares which, together with previously owned shares, resulted in ownership of only 67 percent of the outstanding shares of Credit Corporation (R. 44-45).

The interests of defendants Conrad N. Hilton, Henry Crown and others, as creditors of the Credit Corporation, were concealed. When the stockholders of both companies were informed that Hotels Corporation was to be put into a

4. The effect of the purchase was to reduce working capital of Hotels Corporation by approximately \$3,441,000 at a time when the Corporation's need for working capital was increasing, and to cause Hotels Corporation to take a larger role in underwriting Credit Corporation's debts, liabilities, and losses.

5. A similar objective was set forth in the "offer" of that date (Exhibit F, R. 85-88).

position of greater responsibility for the financial affairs and liabilities of the Credit Corporation, they were not told that this increased responsibility and financial backing would inure in good part to the personal advantage of those individual defendants who, as creditors, faced serious collection problems (R. 45).

As a result of their scheme and their false and misleading representations and deceptive actions, the individual defendants caused the Hotels Corporation to purchase a total of 1,058,997 shares of Credit Corporation stock at a total price of \$3,441,740.25; more than 60 percent (631,262) of these shares were sold by the officers and directors of the Hotels Corporation (R. 46).⁶

On these facts, Petitioner charged in Counts VII through X, respectively, that the individual defendants violated (1) Section 10(b) of the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder (R. 48); (2) Section 17(a) of the Securities Act of 1933 (R. 49-50); (3) Sections 9(a)(4) and 9(c) of the Securities Exchange Act of 1934 (R. 50-51; 54-55); and (4) Section 12(2) of the Securities Act of 1933 (R. 55-56; 60-61). In addition, certain of the defendants were charged in Count XI with

6. Officers and directors of the Hotels Corporation who sold Credit Corporation stock pursuant to the tender offer, and the number of shares which they sold, are as follows:

| Name | Number of Shares Sold |
|--|-----------------------|
| Conrad N. Hilton (including a corporation controlled by him).... | 375,967 |
| Barron Hilton | 126,392 |
| Henry Crown (including a corporation controlled by him) | 70,631 |
| Charles L. Fletcher | 24,100 |
| Robert P. Williford | 14,150 |
| Vernon Herndon | 4,408 |
| Robert J. Caverly | 464 |
| Conrad N. Hilton Foundation (A charitable foundation controlled by Conrad N. Hilton)... | 28,334 |

violating the General Corporation Law of the State of Delaware (Title 8 of the Delaware Code) (R. 61-63).

The Verification.

The complaint was signed by Petitioner's attorneys and verified by Petitioner (R. 63-64). The allegations verified as true and correct of Petitioner's own knowledge were limited in the main to matters relating to Petitioner's status as a shareholder; most of the allegations, particularly those allegations setting forth improper conduct, were verified on information and belief.

Matters Considered on the Motion Below in Addition to the Complaint: the Deposition and Affidavits.

In addition to the pleadings (the complaint), the courts below considered, in passing on the motion to dismiss, (1) the deposition of the Petitioner (R. 94-116), (2) an affidavit by E. T. Cassin (R. 93) submitted by defendants, (3) an affidavit of Irving G. Brilliant (R. 120-134) submitted by the Petitioner, and (4) an affidavit of Walter J. Rockler (R. 135-143) submitted by the Petitioner.

The deposition of the Petitioner was taken on February 25, 1964, two and one-half months after the filing of the complaint and before any answer by the defendants. In response to questions from defendants' attorneys, Mrs. Surowitz stated that she has been the holder of 100 shares of Hotels Corporation common stock since about 1957, and that the stock was purchased for her with her money by her son-in-law and financial advisor, Irving Brilliant (R. 95-97). Upon receiving the documents relating to the tender offer, she turned them over to her son-in-law and inquired as to their meaning (R. 109-10). Shortly thereafter, Mr. Brilliant brought to Petitioner for her signature a letter addressed to the Hotels Corporation protesting the pro-

posed tender offers. After discussing the contents with Mr. Brilliant, Mrs. Surowitz signed the letter (R. 97-98, 110). During the summer of 1963, she complained to Mr. Brilliant about the action of the Hotels Corporation in passing its dividend. Mr. Brilliant said that "he would try to see what was wrong, that I don't get my dividends" (R. 111-12). Finally, on or about December 12, 1963, Mr. Brilliant brought Mrs. Surowitz the complaint. After he read and explained the document to her, she executed the verification (R. 95-96).

Mrs. Surowitz was questioned as to the facts upon which she based certain of the allegations which she had sworn were true and correct. In several instances she replied that she did not know anything about it and did not understand it (R. 102-04).

She was asked to state the facts and information upon which she based her belief as to the correctness of various allegations verified on information and belief. Her answers to these questions were: "I can't explain it to you, I don't know," or the like (R. 105-07). When asked whether she knew any facts at all upon which she based the allegations, Mrs. Surowitz stated, "I don't know. I can't give you no facts because I don't understand it" (R. 107). She further stated that, with respect to all of the allegations of the complaint which she verified on information and belief, "I have no information because my son-in-law, I left it to him, and he was the one that knew all about it" (R. 107). She also stated that she knew nothing about any of the individual defendants personally (R. 101), but that "all I know is that my stock wasn't right, and that's all" (R. 105).

It was evident that Mrs. Surowitz had difficulty understanding several questions. For example, she testified (R. 98):

Q. Can you tell us, Mrs. Surowitz, why you did not

tender your shares of stock pursuant to the offer which is attached to your complaint?

A. I don't know. Can you explain to me what you mean? I don't understand what you are talking about.

Q. Did you understand that there was a solicitation for tender of Hilton Hotels Corporation stock made by Hilton Hotels Corporation?

A. What does it mean, "tender"? I don't understand the word.

At another point, the following exchange took place (R. 100):

Q. Do you have any claims or causes of action against the defendants in this case other than those which were set forth in the complaint, Mrs. Surowitz?

A. What do you mean by that? Can you explain it to me?

Q. You don't understand that question?

A. I don't.

Defendants also filed the affidavit of Mr. E. T. Cassin, Trust Officer and Assistant Secretary of the First National Bank of Chicago, stating that the records of the Bank, as transfer agent for the Hotels Corporation, indicated that the petitioner had been a stockholder of record since October 10, 1963 (R. 93).⁷

The affidavit of Irving G. Brilliant, Petitioner's son-in-law, stated that he is a graduate of Harvard Law School and for the past ten years has acted as a professional investment counselor (R. 120). As of December 1962, members of his immediate family owned more than 2,350 shares of Hilton Hotels Corporation common stock (R. 121). Since 1957,

7. This affidavit was evidently intended to support the ground of the motion to dismiss that Petitioner was not a proper party because she was not a stockholder at the times of the transactions attacked in the complaint. In view of the documentation (R. 125-134) demonstrating her stock ownership in 1957 and thereafter, this contention by the defendants was abandoned. See Opinion of the Court of Appeals, R. 226, footnote 9.

his mother-in-law, Mrs. Dora Surowitz, has been purchasing small amounts of stock in reliance upon his suggestions and advice, and on August 1, 1957 she purchased 100 shares of Hilton Hotels Corporation common stock (R. 121).

Mrs. Surowitz, a woman in her sixties, is an immigrant from Poland. She has had limited schooling and has difficulty understanding English, except in ordinary everyday matters. She has an extremely limited understanding of corporate or securities transactions. For these reasons Mrs. Surowitz has relied completely upon Mr. Brilliant in financial matters (R. 121-22).

In December 1962, Mrs. Surowitz brought him the papers relating to the tender offer of the Hotels Corporation and inquired as to the nature of the transaction. He informed her that he was studying the matter (R. 122). Shortly thereafter he contacted Walter J. Rockler, with whom he discussed the tender. They jointly reached the conclusion that the proposed transaction was questionable and should be objected to. Accordingly, Mr. Rockler prepared a letter of protest which was signed by Mrs. Surowitz after Mr. Brilliant explained its nature to her (R. 122). He personally conducted investigations into the transactions and communicated the results to Mr. Rockler (R. 123).

Upon the decline in market price of Hotels Corporation stock and the passing of its dividend during 1963, Mrs. Surowitz asked him for advice. He told her that Mr. Rockler was of the opinion that the officers and directors had engaged in wrongful acts and suggested that, to prevent further mismanagement, it might be wise to bring suit. After discussing the matter with Mr. Brilliant, Mrs. Surowitz stated that she was willing to sue (R. 123-24).

Upon receiving the complaint, he read and explained it to Mrs. Surowitz and informed her that the charges contained in it reflected his and Mr. Rockler's investigations

and that, in his opinion, the charges of wrongdoing were soundly based (R. 124).

Walter J. Rockler, in his affidavit, substantiated many of the statements contained in Mr. Brilliant's affidavit with respect to the background of the suit, and, in addition, described the nature and extent of the investigations, sources of facts, and studies made by him and his associates over a period of about one year prior to filing the complaint (R. 135-43). The affidavit specifically stated that "the allegations specified in the verifications to be true and correct were and are true and correct," and that he believes that "the complaint in this action [is] firmly grounded in fact and law . . ." and that a trial would "establish the merits of the plaintiff's position . . . and the substantial truth and soundness of the allegations of fact set forth in the complaint." (R. 142-43.)

District Court's Order of Dismissal.

After reviewing Mrs. Surowitz' deposition and the affidavits, and after hearing argument on March 23, 1964, the District Court on March 30th entered an order of dismissal supported by Findings of Fact and Conclusions of Law (R. 145-58) to the following effect:

1. The verification of Mrs. Surowitz was false (R. 156-57). Consequently it was a nullity and did not constitute the verification required by Rule 23(b) (R. 157). The failure of Mrs. Surowitz to supply information about the charges of the complaint "was not caused by the use of technical language in the questions or by her failure to understand what was being asked." (R. 153.)

2. The requirements of Rule 23(b) are in addition to those of Rule 11. Rule 23(b) provides protection against the filing of sham or frivolous complaints, and against the evil of attorneys or others maintaining shareholders' deriv-

ative suits by seeking out and inducing shareholders, without knowledge of alleged wrongdoing, to lend their names as plaintiffs. Accordingly, it is not sufficient compliance with Rule 23(b) to attach a false verification or the verification of a person who has no knowledge or understanding concerning even the general nature of the charges made in the complaint and who executes the verification in blind trust and faith on the assurance of some other person that there is a sound basis for the allegations (R. 157).

3. The purpose of the verification required under Rule 23(b) is to permit defendants to examine the plaintiff concerning the factual basis upon which allegations are made before the defendants are required to proceed with the costly and burdensome task of discovery in such complex cases. If the purpose of this requirement is to be accomplished, the plaintiff verifying the complaint must at least understand the nature of the charges in the complaint and have some knowledge concerning its factual basis (R. 157).

Finally, the District Court struck the complaint and dismissed the action for the reason, additionally, that counsel filed a false affidavit with respect to costs and expenses of the suit⁸ (R. 158).

8. This determination was reversed by the Court of Appeals, which held, "So far as the order of dismissal rests upon the determination that the attorneys violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous" (R. 228-29). Parenthetically, it should be noted that thus far in the suit two other grounds for dismissing the cause have also failed: (1) that the complaint is a sham in the usual sense of being devoid of substance; and (2) that the Petitioner was not a stockholder at the time of the transactions complained of. Cf. fn. 7, *supra*.

Decision of the Court of Appeals.

The Court of Appeals affirmed the dismissal, declaring that "the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life" (R. 238). In reaching its admittedly novel and unprecedented conclusion (R. 233), the Court of Appeals apparently reasoned as follows:

1. If verification under Rule 23(b) is to be meaningful and is to furnish added assurance of the "legitimacy" of a complaint (R. 235-37), the plaintiff must have a knowledge of his relationship to the suit, the official identities of the parties charged, and a general understanding of the foundation of the complaint (R. 236). Petitioner, a woman of little education, wholly lacking in financial comprehension, did not have any grasp of the offenses charged and could not identify the individual defendants in their corporate roles as officers and directors. Her verification of the complaint was "without knowledgeable or informative comprehension" (R. 238). It was, therefore, "false" (R. 235). The verification, being "false" in this sense, made the complaint a sham (R. 238).

2. Neither counsel's certification by signing the complaint nor counsel's affidavit detailing the investigations conducted prior to filing the complaint and attesting to the truth of the complaint remedied the defect (R. 237-38). Counsel's affidavit was not an additional verification because it was filed in response to defendants' motion and not upon a separate motion to substitute a new verification or as an amendment to the complaint (R. 238).

3. The policy of the federal securities laws has nothing to do with the case (R. 229). That policy may be to protect

the gullible and ignorant but, since the case involves a derivative action, the complaint must be verified. Since petitioner is too ignorant to verify properly, she is barred by Rule 23(b) from complaining of these securities acts violations.

4. The complaint is a sham even though many of the allegations are "obviously true and cannot be refuted" (R. 236). Indeed, although not a single allegation is shown to be false in any way, the complaint is a sham. The suit was properly dismissed with prejudice under Federal Rule 41(b) (R. 238).

5. In essence, therefore, the Court of Appeals held that by reason of Petitioner's limited understanding and knowledge—defects inherent in her limited education, limited command of English, and limited knowledge of corporate and financial matters—"there was, in fact, no verification of this complaint" (R. 236).

SUMMARY OF ARGUMENT.**I.**

The true purpose of Rule 23 (b) of the Federal Rules of Civil Procedure is to prevent corporate managers from collusively obtaining federal jurisdiction. This objective is made clear in *Hawes v. Oakland*, 104 U. S. 450 (1882), where the Rule had its origin. Verification under the Rule is primarily intended to furnish maximum warranties in these jurisdictional areas. It was not the purpose of this Court, in formulating the Rule, to hamper or restrict legitimate stockholder suits bringing corporate causes of action in the federal courts. Rather, the Rule was directed at corporate officers and directors who sought to make use of compliant stockholders for the purpose of securing federal jurisdiction in instances where otherwise it could not be obtained. Verification was never intended to set the stage for a preliminary pre-trial testing of the stockholder-plaintiff's fitness or mental capacity.

Rule 23 (b) should be interpreted liberally in light of its origin and purposes. It should not be employed, as it was here, to bar a stockholder from seeking to enforce corporate causes of action under the Securities Acts simply because of her limited understanding. This result is particularly indefensible in a situation in which, realistically, the stockholder is simply the vehicle for bringing the corporate causes of action to court. In such cases, the stockholder-plaintiff is required only to have sufficient interest to enable him to institute the action, since the corporation is the real party in interest.

Petitioner truthfully verified the facts upon which her standing to sue rests, namely, her residence in New York, her ownership of Hilton Hotels Corporation stock since 1957, and her sending a letter of protest to the Corporation

at the time of the tender transactions complained of. The suit is plainly not collusive in any respect. In verifying the substantive allegations on information and belief, Petitioner was entitled to rely upon her son-in-law, who had acted as her investment advisor, and upon the information he and her attorneys collected and relayed to her. Even if Petitioner's verification was in any respect insufficient, the courts below should have viewed the affidavits of the son-in-law and one of the attorneys as more than adequate to make up the deficiency. The courts below, in searching the record, should not have disregarded the additional affidavits. Actually, these affidavits go considerably beyond the confines of formal verification and constitute significant assurances of the substantial character of the allegations in the complaint.

II.

The Federal Securities Acts are designed to protect ignorant, uninformed, and gullible investors, and Congress intended that the private suit serve as a means of enforcement. Where a stockholder sues, his mental capacity, personal knowledge, and ability to explain the violations charged have nothing to do with the propriety of the action. There are also strong public policy considerations in favor of derivative suits in which stockholders bring to court corporate causes of action to check wrongdoing by officers and directors. Although such suits are attended by many obstacles and difficulties, they represent an essential remedy against abuses by insiders.

The Securities Acts and derivative suits as instruments for preventing corporate misconduct are especially important in light of the increasing number of uninformed, small stockholders, particularly women. The role such stockholders can play in checking abuses is of major significance in the area of corporate tender offers whereby corporations

buy in their own shares. Such practices by corporations have been growing, and there is not, at the present time, effective SEC supervision and policing. Combining the Federal Securities Acts and the derivative suit represents the best weapon available for checking abuses in the use of tender offers.

III.

The Federal Rules of Civil Procedure are to be construed liberally, and considerations of fundamental justice should not be sacrificed to technical interpretations of procedural rules. Rule 41 (b) has been used principally in aggravated cases involving failure to prosecute or disobedience to court orders. Here the use of the Rule to dismiss Petitioner's complaint without a hearing on the merits, in circumstances in which the validity and solidity of the complaint were expressly recognized, is virtually tantamount to imposing punishment on Petitioner for her supposed transgression. This Court has recognized that there are due process limitations on the power of courts to dismiss without affording the party dismissed an opportunity for a hearing on the merits. Here the facts are peculiarly within defendants' knowledge. Any expectation that the facts could be extracted from the Petitioner—in a suit such as this one—is unrealistic and unreasonable. Once the District Court was satisfied that the complaint was not a sham, it should have ordered the defendants to answer.

ARGUMENT.

I.

THE SPECIAL REQUIREMENTS OF RULE 23(b) WERE NOT DIRECTED TOWARD ABUSES BY STOCKHOLDERS IN SUING TO REDRESS CORPORATE WRONGDOING. RATHER, THEY WERE DEvised TO PREVENT CORPORATE MANAGERS FROM MAKING USE OF PLIANT STOCKHOLDERS FOR THEIR OWN PURPOSES.

The District Court below evolved a novel theory of the meaning and purpose of the verification requirement of Rule 23(b), namely, that it was designed "to permit defendants to examine plaintiff concerning the factual basis upon which allegations of a complaint are made before defendants are required to proceed with the extremely costly and burdensome task of discovery [in] such complex cases" (R. 157). This being its purpose, "the person verifying the complaint must at least understand the nature of the charges in the complaint and have some knowledge concerning the factual basis for those charges" (R. 157).

The Court of Appeals, understandably, made no effort to sustain this view. Instead, it asserted that the Rule was intended, among other purposes, "to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit" (R. 232). The Court of Appeals also stated that, while a derivative suit may have a "secondary value" to the stockholder-plaintiff in protecting the integrity of his investment, "the necessity for the contemporaneous protection of the corporation itself and of its officers and directors from ill-conceived, nuisance-value litigation is, at least, a consideration of equal value."

(R. 232-33.) The Court then stated its conclusion as to the purpose of the Rule's verification requirement (R. 235-36):

The derivative suit is a unique vehicle of litigation. The holder of one share of stock who is disgruntled at some act of the corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel the plaintiff to begin such a suit with sufficient knowledge of facts and information to show by his verification that there is a substantial basis to support the complaint which he makes.

Thus both the District Court and the Court of Appeals—although finding different purposes in the Rule—agree in one significant respect: both courts are firmly of the opinion that a principal reason for Rule 23(b) and its verification requirement is the protection of the corporation (and, necessarily, its officers and directors) from unwarranted litigation.

It is submitted that, despite the dicta of some lower courts, the purpose is quite different: *it is to protect the federal courts from collusive devices engineered by corporate officers and directors to get into the federal courts and thereby to convert ordinary law actions into suits in equity.* This purpose rests not on a view of the probability of reckless and ill-founded suits by irresponsible stockholders but rather on the belief that corporate management will deliberately use compliant shareholders in order to accomplish corporate objectives. The thrust of the Rule is not against stockholders but against corporate managements.

A.

The Original Purpose of Rule 23(b) Was to Prevent Collusive Attempts to Obtain Jurisdiction in Equity in the Federal Courts Over Law Actions Where Valid Grounds for Federal Equitable Jurisdiction Did Not Exist.

As the Notes of the Advisory Committee on the Rules point out, Rule 23(b) was derived from old Equity Rules 94 and 27.⁹ Equity Rule 94 was promulgated by the Supreme Court one week after its decision in *Hawes v. Oakland*, 104 U. S. 450 (1882). In Equity Rule 94, as in the *Hawes* case, the Court indicated its strong concern that there should not be an abuse of federal diversity jurisdiction. See *City of Quincy v. Steel*, 120 U. S. 241, 245 (1887). The purpose of the Rule was plainly not to impede or create barriers to stockholders' suits. To the contrary, in the *Hawes* decision this Court noted (at page 453):

The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are *real contests*, however, between the stockholder and the corporation of which he is a member. (Emphasis added.)

What did plainly concern this Court was the widespread use of the doctrine of *Dodge v. Woolsey*, 50 U. S. (18 How.) 231 (1856), which opened the door to the federal courts in equity, via diversity of citizenship, in suits where stockholders charged that officers and directors of state cor-

9. The language of Rule 23(b) is very similar to the language of those Equity Rules. Equity Rule 27, promulgated in 1912, simply added to the end of the original Rule, Rule 94 (1882), the phrase "or the reasons for not making such effort." The text of Equity Rule 94 is to be found at 104 U. S. ix-x.

porations had failed to perform their duties or had violated corporate charters. As the Court noted in the *Hawes* case (104 U. S. 450, 452-53):

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of the state courts, which are their natural, their lawful and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal Court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another state.

* * * * *

If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit.

To prevent such contrived lawsuits, the Court announced certain essential preliminaries (104 U. S. 450, 460-61):

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

The Rule, therefore, was designed to prevent collusion (a "friendly" derivative suit) by having non-resident stockholders appear as record plaintiffs. See *Groel v. United Electric Co.*, 132 Fed. 252 (C. C. N. J. 1904); Annotation,

"Stockholders' Actions—Federal Courts," 68 A. L. R. 2d 824, 843 (1957). Accordingly, the Rule required a specific averment against collusive action to confer federal jurisdiction. It also provided for an allegation that the plaintiff was a stockholder at the time of the transactions complained of; this, too, was aimed against transfers of stock to non-residents for collusive jurisdiction purposes. The requirement of demand for action on corporate management had a similar objective.

The requirement of verification, it seems clear, was intended still further to strengthen the assurances against collusive attempts to create federal jurisdiction. *Jacobson v. General Motors Corp.*, 22 F. Supp. 255, 257 (S. D. N. Y. 1938). Verification of the specific allegations called for by the Rule enhanced the likelihood that the plaintiff-stockholder was not acting at the behest of management, but rather was truly acting in a situation in which the corporation would not assert the corporate cause of action.

This Court was not seeking to impede "real contests" between stockholders and corporations or their officers which could come to the federal courts on grounds of diversity of citizenship. But it did want to stem the flood of "contrived contests" which were designed, not to permit the adjudication of real issues between the stockholders and the corporations or their officers, but to permit the corporations to misuse the federal courts.

A "real contest" was therefore one in which, but for the stockholder litigant, the cause of action—which was really the corporate cause of action—would not come to court at all. As the Court noted in *Delaware and Hudson v. Albany & Susquehanna R. Co.*, 215 U. S. 435, 446-47 (1909), where the corporate management is truly derelict and "the interests of stockholders put in peril . . . a case hence arises in which the right of protecting the corporation accrues to them." A contrived contest was one which, if Equity Rule

94 barred entrance to the federal courts, would find its way to a state court where it properly belonged, since the corporate managers wanted to bring it. There is nothing in the origin of the Rule even to suggest that this Court was seeking to make the bringing of a "real contest" against the corporation or its managers more difficult, or to protect those managers from suits by aggrieved stockholders. Cf. *Huntington v. Palmer*, 104 U. S. 483 (1882); *Doctor v. Harrington*, 196 U. S. 579 (1905); *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. 954, 957 (C. C. N. Y. 1908).

Since its inception, the Rule has picked up some not so clearly-related interpretations in the lower courts. Solicitude for management and the opprobrium attached to strike or nuisance suits have combined to produce pronouncements to the effect that the Rule is designed to protect corporations and their officers and directors from strike suits, *Pioche Mines Consolidated, Inc. v. Dolan*, 333 F. 2d 257 (C. A. 9th 1964), and to discourage speculation in litigation, *Gottesman v. General Motors Corp.*, 28 F. R. D. 325 (S. D. N. Y. 1961).¹⁰ These views, of course, found expression in the opinion of the Court of Appeals below.

Whatever the occasion for these pronouncements, the results have been manifestly inconsistent with and unwarranted by the purpose of the Rule.¹¹ As one commentator

10. Other courts have even suggested that one of the Rule's purposes is to prevent champerty and maintenance. See *Bauer v. Servel, Inc.*, 168 F. Supp. 478, 481 (S. D. N. Y. 1958). Judge Roscoe Pound, however, was of the opinion that this latter consideration was not a reason for the Rule. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 657-58; 93 N. W. 1024, 1029 (1903).

11. In light of the end sought to be achieved by promulgation of the Rule as disclosed in *Hawes v. Oakland* and subsequent cases in this Court, the application of the Rule to a derivative suit based upon a "federal question," and especially upon a question under the Federal Securities Acts, where the corporation, were it not in hostile hands, could itself properly bring the suit in a federal equity court, is questionable. The function of the Rule is not

noted (1 Foster, *Federal Practice*, § 145, p. 810, 6th ed. 1920):

The original object of the rule was to prevent suits brought by stockholders, in collusion with the corporation, in Federal Courts, which otherwise would not have had jurisdiction thereof, and to remedy abuses in this respect, which had then become a common practice. It has been extended in the lower courts so as often to defeat the rights of shareholders and shield and encourage dishonesty by directors and officers of corporations.

B.

The Verification Requirement of Rule 23(b) Should Be Interpreted and Applied in Light of the Basic Reasons for the Rule.

The verification requirement of Rule 23(b), designed "to prevent collusive resort to the federal jurisdiction" (*Jacobson v. General Motors Corp.*, 22 F. Supp. 255, 257 (S. D. N. Y. 1938)), is not to be invoked in an arbitrary way "which would result in the emasculation of the equitable considerations that led to its enactment". *Cohen v. Industrial Finance Corp.*, 44 F. Supp. 491, 494 (S. D. N. Y. 1942); cf. *Hoover v. Allen*, 180 F. Supp. 263 (S. D. N. Y. 1960). Obviously, in a derivative suit, no rule of court can compel the plaintiff to verify substantive facts which are outside his grasp or understanding. Consequently, great latitude should be allowed in pleading, "since the facts are peculiarly within the defendants' knowledge and the sources of information are subject to their control." Hornstein, "Legal Controls for Intra-Corporate Abuse—Present and

involved. As far as we can ascertain, the pertinence of Rule 23(b) in such a suit has never been before this Court, but Petitioner need not go so far as to urge the point here. Compare *Lindsley v. National Carbonic Gas Co.*, 162 Fed. 954 (C. C. N. Y. 1908), and *Dottenheim v. Murchison*, 227 F. 2d 737 (C. A. 5th 1955), cert. den. 351 U. S. 919 (1956), with *Gottesman v. General Motors Corp.*, 28 F. R. D. 325 (S. D. N. Y. 1961).

Future", 41 Col. L. Rev. 405, 416-17 (1941). Rule 23(b) was never intended to impose a threshold standard of knowledge and understanding on the part of stockholder-plaintiffs as a condition to admission to the district courts.

Realistically, in a suit such as this one, personal knowledge by the plaintiff-stockholder is likely to be rare and unimportant. Insofar as the courts may require some assurance that the suit is not frivolous or baseless, the burden imposed on counsel by Rule 11 serves that purpose. *Murchison v. Kirby*, 27 F. R. D. 14 (S. D. N. Y. 1961); *Palmer v. Morris*, 316 F. 2d 649 (C. A. 5th 1963); cf. the remarks of Judge Clark quoted in *Freeman v. Kirby*, 27 F. R. D. 395, 399, n. 3 (S. D. N. Y. 1961).

Since the corporation is the real party in interest, and since the cause of action is that of the corporation, in a very real sense the plaintiff-stockholder's role is a nominal one. He is merely the person through whom the corporation's cause of action is brought to court in instances in which the corporation will not take the initiative. The stockholder's derivative suit "is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers". *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U. S. 518, 522 (1947). Although in some instances the stockholder may have a substantial personal interest, in others "he may also be a mere phantom plaintiff with interest enough to enable him to institute the action and little more." 330 U. S. 518, 525. So far as the stockholder's knowledge of the corporation's affairs is concerned, this Court observed in *Koster* (330 U. S. 518, 525):

He may have taken some active part in the corporate affairs, or have personal knowledge of them, or have had dealings in course of protest and objection which make it requisite or at least expedient for him personally to be present at the trial. Or he may, like this

plaintiff, make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation.

Other courts have been inclined liberally to construe the verification requirement. See *Bosc v. 39 Broadway, Inc.*, 80 F. Supp. 825 (S. D. N. Y. 1948); *Hoover v. Allen*, 180 F. Supp. 263 (S. D. N. Y. 1960). It seems clear that in doing so, these courts have been interpreting the Rule consistently with its true purposes. As this Court remarked at a relatively early point in the history of the Rule, it "is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." *Delaware and Hudson v. Albany & Susquehanna R. Co.*, 213 U. S. 435, 452 (1909).

The verification requirement cannot be viewed as a separate, distinct and unrelated requirement of the Rule; rather, it is a means of guaranteeing that the purposes of the Rule will be accomplished. The grammar of the Rule—both as originally written and as it now is embodied in Rule 23(b)—indicates that the entire complaint in a derivative suit is to be verified. In light of the origin and formation of the Rule, however, it seems evident that what this Court was most concerned about was *the veracity of the allegations indicative of the stockholder-plaintiff's bona fide status or standing to sue*.

Ordinarily, the plaintiff will know better than anyone else the matters required to be specifically averred by Rule 23(b), that is, the facts as to the plaintiff's ownership of stock and the period thereof, the plaintiff's residence, the absence of collusion with management, and efforts to secure corporate redress. Verification of these facts by the plaintiff furnishes the federal court with assurances as to matters required by the Rule.

No purpose of the Rule is served by requiring that the plaintiff must personally know, understand, or be able to

explain the basic facts or legal theory of the suit or the roles and activities of the individual defendants. By its terms, the Rule does not specify any degree of personal knowledge or understanding. Nor does the Rule bar a plaintiff verifying on information and belief from relying *wholly* on her advisors and legal counsel. The views of the courts below are therefore an unprecedented judicial gloss.

Even if one were to assume that those courts which regard the Rule as also aimed at speculation in litigation, at strike suits, and at champerty and maintenance are correct, it seems clear that a demonstration of the plaintiff-stockholder's knowledge and understanding is no protection against the supposed evils. A clever and articulate plaintiff, who can recite the theory and facts of a complicated complaint, may bring a worthless suit in bad faith. Conversely, a meritorious lawsuit may, as in Mrs. Surowitz' case, be filed by a stockholder of limited understanding. This is merely to say that the good faith character and assurance of merit in a suit cannot be determined by appraising the plaintiff-stockholder's analytical capacity, as the Court of Appeals seems to assume.

C.

Petitioner Truthfully Verified the Allegations Upon Which Her Standing to Sue Rests.

Mrs. Surowitz' verification asserts the truthfulness of the following italicized allegations (R. 64):

1. *She resides in and is a citizen of New York and is and has been a holder and owner of shares of \$2.50 par value common stock of Hilton Hotels Corporation, which stock is registered and listed on and traded over the New York and Pacific Coast Stock Exchanges (Paragraph 1 of each court, R. 2, 15, etc.).* Mrs. Surowitz testified that

she resides at 1299 Ocean Avenue, Brooklyn, New York (R. 94) and that she acquired her Hotels Corporation shares "about 1957" (R. 96). The brokers' statements attached to Mr. Brilliant's affidavit, Exhibits A to I inclusive (R. 125-33), show Mrs. Surowitz' name, her Brooklyn address, and the purchase and holding by the brokers of 100 shares of Hotels Corporation stock from August 1, 1957 until October of 1963, at which time the shares were delivered. The December 17, 1962 offer sent by the Hotels Corporation to its shareholders, Exhibit B attached to the complaint, refers to the corporation's \$2.50 par value stock and states that it is "listed on the New York and Pacific Coast Stock Exchanges" (R. 67). Mrs. Surowitz testified that she received this document and turned it over to her son-in-law (R. 109). At her deposition, Mrs. Surowitz was not asked any questions relating to her knowledge about the \$2.50 par value of the stock or its being traded on the New York and Pacific Coast stock exchanges.

2. *Plaintiff brings the action on behalf of herself and the other approximately 12,000 holders of common stock to enforce rights of the Hotels Corporation* (Paragraph 1 of each count, R. 2, 15, etc.). Mrs. Surowitz was not asked any questions about this allegation.

3. *The action is not a collusive one to confer jurisdiction on the court of a cause of action over which it would otherwise not have jurisdiction* (Paragraph 1 of each count, R. 2, 15, etc.; Paragraph 5 of count VI, R. 35). With regard to this allegation, Mrs. Surowitz was asked the following question: "Can you give me the factual basis upon which the allegation is made under oath?" Her reply was: "I don't know. I can't tell" (R. 103-104). The question, of course, calls for an analysis of the facts leading to a legal conclusion; it is a question which only a lawyer, familiar with the collusive-suit problem as it relates to federal diversity jurisdiction, could reasonably answer.

More significantly, however, there hardly could be a "factual basis" for the assertion that a suit is not collusive *other than the absence of any facts which would suggest collusion.*

It is crystal clear that this suit is not collusive. As a matter of fact, with respect to the eight counts which plead federal causes of action under the Securities Act of 1933 and the Securities Exchange Act of 1934, the collusive-suit problem does not arise at all. But more, answers elicited from Mrs. Surowitz at her deposition indicate that her state of knowledge fully justified the conclusion, obviously framed by her attorneys, that the suit was not collusive. She testified that she did not personally know any of the individual defendants (R. 101), that she never had conversations with any of them, and that no such conversations had ever been reported to her (R. 100-01).

4. Finally, Mrs. Surowitz swore to the truthfulness of the following allegation: "*Plaintiff has heretofore protested to the defendant Corporation against the gross impropriety of the acts set forth above*" (Last sentence of paragraph 13 of counts I, II, V and VI; last sentence of paragraph 10 of counts III and IV; last sentence of paragraph 14 of counts VII, VIII, and XI; last sentence of paragraph 12 of counts IX and X (R. 14, 16, etc.).

Mrs. Surowitz was questioned twice about the factual basis for this allegation. In each case (R. 103, 104) she did not know or understand anything about it. Earlier in the deposition, however, Mrs. Surowitz testified that she signed a letter which Mr. Brilliant had brought to her; the letter was dated January 22, 1963 and was addressed to the Hotels Corporation (R. 97). The letter, Exhibit 1 to the deposition (R. 116), reads as follows:

As a stockholder, I protest and challenge propriety of proposed plan to redeem company's common stock

and reduce its capitalization as set forth in your letters of December 17 and January 7.

I also challenge propriety of plan to purchase shares of Hilton Credit Corp. as set forth in your letter of January 7. Proposed actions serve no corporate interest and seem clearly detrimental to the welfare of the corporation and most of its stockholders.

/s/ DORA SUROWITZ,
1299 Ocean Avenue,
Brooklyn, N. Y.

This is the letter which Mr. Rockler prepared at Mr. Brilliant's request (R. 122, 137). Mr. Brilliant stated (R. 122): "I explained the letter to Mrs. Surowitz and told her that I had reviewed the matter with an attorney in Chicago. She signed the letter, and I mailed it to the corporation." Obviously the letter is the basis of the allegation that Petitioner heretofore (that is, prior to filing the complaint) protested to the Hotels Corporation. She knew about the letter, and she identified her signature; at the time Mr. Brilliant came to her with the letter Mrs. Surowitz testified that he told her "he would take care of it" (R. 110).

D.

Petitioner's Verification on Information and Belief of the Substantive Allegations Was Proper.

The Court of Appeals considered that the verification reflected "the mere formality of recklessly swearing to the truth of matters not known", and was therefore a nullity (R. 235).

The record establishes that Mrs. Surowitz relied implicitly on and trusted and believed in her son-in-law's information and advice. She purchased the very stock giving rise to the suit solely upon his recommendation. Throughout the pendency of the transactions in question and after

they had been carried through, the Petitioner consulted her son-in-law, who in turn investigated on his own and consulted legal counsel. Upon at least four occasions before bringing suit the Petitioner discussed the matters involved in the complaint: (1) when she received documents from the corporation, (2) when Mr. Brilliant brought the letter of protest to her, (3) when the dividend was passed, and (4) when the complaint was reviewed with her. In each instance, her son-in-law, after investigation, presented his views and recommendations. It is not at all clear why the Petitioner could not place faith in the honesty and wisdom of the advice she received both directly from Mr. Brilliant and indirectly through legal counsel who investigated the facts and prepared the complaint.

In any event, the verification on *information* and *belief* was not intended to and does not import personal *knowledge* and *understanding*. "Information", according to the *Oxford Universal Dictionary* (3rd ed., Oxford, 1955), refers to the "act of informing . . . the act of telling or the fact of being told of something" (Emphasis added). *Webster's Third New International Dictionary* defines it as "something received or obtained through informing." "Belief", says *Webster's*, is a "state or habit of mind in which trust, confidence or reliance is placed in some person or thing; faith." "Information" implies a *lack* of knowledge. See *State v. Simpson*, 136 Mo. App. 664, 667; 118 S. W. 1187, 1188 (1909). And "between mere belief and knowledge there is a wide difference." *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374, 384 (1888).

The description of corporate and financial manipulations set forth in the complaint was not prepared by Mrs. Surowitz; she did not personally ascertain the facts; nor are these kinds of transactions within her experience. It by no means follows that she was not informed and did not

believe what she was told by her son-in-law two and one-half months before the deposition.

No other court decision supports the kind of findings made here and the conclusions drawn therefrom. The case of *Murchison v. Kirby*, 27 F. R. D. 14 (S. D. N. Y. 1961), squarely repudiates both. The views in the *Murchison* opinion have been cited and quoted with approval in *Palmer v. Morris*, 316 F. 2d 649 (C. A. 5th 1963), where the Court of Appeals considered the requirements of a Rule 23(b) verification.

In other instances where verifications have been under attack, the courts have sustained the propriety of basing a verification on information and belief without personal knowledge. See *Manson v. Inge*, 13 F. 2d 567 (C. A. 4th 1926); *In re Thomas*, 211 F. Supp. 187 (D. C. Colo. 1962). As one Court of Appeals has observed, "knowledge in most affairs in life comes to us from information communicated to us by others." *In re Eastern Supply Co.*, 267 F. 2d 776, 778 (C. A. 3rd 1959). Also, "petitioner was not required to allege a fact . . . of his own knowledge, when it was hardly possible that he should know such fact." *In re Haskell*, 73 F. 2d 879, 880 (C. A. 7th 1934). To "require the specifications to be verified positively or on personal knowledge would place an undue burden" on the verifier where the facts lie particularly in the personal knowledge of the defendants. *Manson v. Inge*, 13 F. 2d 567, 569 (C. A. 4th 1920). Accordingly, verification may be properly made as to facts "derived from information which the affiant deems reliable". *In re Eastern Supply Co.*, 170 F. Supp. 246, 250 (W. D. Pa. 1959), aff'd 267 F. 2d 776 (C. A. 3d 1959) (Emphasis added).

E.

In Any Event, the Affidavits of Rockler and Brilliant Attested to the Truth and Accuracy of the Complaint and Could Not Be Ignored on the Motion to Dismiss.

In his sworn affidavit, Petitioner's counsel described his investigations and the obtaining of information from the SEC and from counsel for the defendants. This affidavit concluded: "To the knowledge of affiant, the allegations specified in the verification to be true and correct were and are true and correct." Further, "Affiant states that as a result of his investigations he believes the complaint in this action to be firmly grounded in fact and law. He fully expects that a trial of this matter will establish the merits of the plaintiff's position on behalf of herself and all other stockholders and the substantial truth and soundness of the allegations of fact set forth in the complaint." (R. 142-143.)

In his sworn affidavit, the Petitioner's son-in-law and advisor described the circumstances of his investigation into the challenged transactions. He concluded by stating that he told Petitioner that "the charges in the complaint reflected the investigations and study of Mr. Rockler and myself and that, in my opinion, the charges of wrongdoing were soundly based." (R. 124.)

These declarations under oath are plainly equivalent to additional verifications. They include not only the basic elements of verification, but go further in setting forth at length the bases and sources of the facts alleged in the complaint. Cf. *Bosc v. 39 Broadway, Inc.*, 80 F. Supp. 825 (S. D. N. Y. 1948); *Brown v. Bernstein*, 49 F. Supp. 497, 499 (M. D. Pa. 1943).

If the affidavits in effect constitute verifications, they do not lose that character because they are entitled "Affi-

davits''. Cf. *Brown v. Bernstein*, 49 F. Supp. 497, 499 (M. D. Pa. 1943). Since these affidavits were properly before the District Court in response to defendants' motion, it would have made little sense to file later an independent motion to submit them in order to relabel them "Verifications" (Cf. R. 238).

Where a trial court permits the introduction of materials outside the pleadings, "the inference to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U. S. 654, 655 (1962). Thus, where a defect in pleading federal jurisdiction was charged, this Court held that the defect was cured elsewhere in the record, *Sun Printing & Publishing Association v. Edwards*, 194 U. S. 377, 382 (1904):

The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient.

The issue is not one of labels—"verifications" vs. "affidavits"—but one of dismissing a case, without regard to the merits or any hearing on the merits, because of an alleged lack of sworn assurances. Therefore, even if contrary to the Petitioner's argument throughout, the Court of Appeals was entitled to treat Petitioner's verification as a nullity, complete disregard of the other statements under oath in the record, attesting to the truth of the complaint on the basis of investigation, research, information, and understanding, remains inexplicable and, in the circumstances, patently erroneous. Cf. *Lau Ah Yew v. Dulles*, 236 F. 2d 415 (C. A. 9th 1956).

II.

THERE ARE COMPELLING REASONS OF PUBLIC POLICY WHICH REQUIRE THAT STOCKHOLDER DERIVATIVE SUITS CHALLENGING CORPORATE TENDER OFFERS AS VIOLATIONS OF THE SECURITIES ACTS SHOULD BE ENCOURAGED, RATHER THAN HAMPERED OR RENDERED MORE DIFFICULT.

A.

The Policy of the Federal Securities Acts Is to Protect Investors, Particularly the Ignorant, the Uninformed, and the Gullible. One Important Means Provided by Congress for Their Protection Is the Private Suit.

The considerations which motivated the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934 are clear. Prior to the passage of these Acts, the regulation of the abstract and intricate business of trading in securities had been limited mainly to suits based on the law of fraud and deceit and the Blue Sky statutes enacted by state legislatures. The technicalities of the common law of fraud and deceit and the limitations of state jurisdiction made both sources of regulation ineffective. *United States v. Monjar*, 47 F. Supp. 421, 426 (D. C. Del. 1942), aff'd 147 F. 2d 916 (C. A. 3d 1944), cert. den. 325 U. S. 859 (1945); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 292 (1963). The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted to protect "those who did not know market conditions from the overreaching of those who do." *Charles Hughes & Co. v. Securities & Exchange Com'n*, 139 F. 2d 434, 437 (C. A. 2d 1943), cert. den. 321 U. S. 786 (1944).

In its Second Annual Report, the Securities and Exchange Commission summarized the purposes of the federal securities laws in the following terms (page 1):

The purposes of the Securities Act of 1933, as outlined in the Report of the Commission on Banking and Currency are to prevent exploitation of the public by the sale of unsound . . . securities through misrepresentation; to place adequate and true information before the investor . . .

The objectives sought in the passage of the Securities Exchange Act of 1934 were threefold, viz., to prevent the excessive use of credit to finance speculation in securities; to see to it that the market places in which securities are purchased and sold, such as the stock exchanges . . . are purged of the abuses which had crept into them; and to make available to the average investor honest and reliable information sufficiently complete to acquaint him with the current business conditions of the company, the securities of which he may desire to buy or sell.

The purpose of these laws was stated even more succinctly in earlier Congressional debate. "We want to protect the gullible investor, the investor who has been imposed upon . . ." (Representative Parker, 77 Cong. Rec. 2920, 73rd Cong., 1st Sess. (1933)). Another Congressman observed that the pending bill marked "a new recognition of responsibility on the part of the Government for the safety of investments made by millions of wage earners and small businessmen." (Representative Koppleman, 77 Cong. Rec. 2939, 73rd Cong., 1st Sess. (1933)).

Early court decisions established that it was no defense to a claimed violation of either of the Acts that the fraud was patent and could have been discovered by anyone of ordinary intelligence. "... The statutes . . . were enacted for the very purpose of protecting those who lacked business acumen. The need for such statutes is that 'the credulity of mankind remains yet unmeasured.' " *United States v. Monjar*, 47 F. Supp. 421, 425 (D. C. Del. 1942); *Securities & Exchange Com'n v. Time Trust Inc.*, 28 F. Supp. 34, 42-43 (N. D. Cal. 1939).

As further protection, injured persons were given a private right of action under the Acts. Fraud and chicanery in the securities field had been too pervasive to leave its regulation solely to the SEC with its limited resources of personnel and funds. Private action became an avowed means of legislative enforcement. See *J. I. Case Co. v. Borak*, 377 U. S. 426, 431-33 (1964); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963).

Consistent with this strong policy, the courts have brushed aside attempts to create impediments to actions by stockholders or other investors. Cf. *McClure v. Borne Chemical Co.*, 292 F. 2d 824 (C. A. 3d 1961), cert. den. 368 U. S. 939 (1961) (involving an attempt to require security for costs in an action by a stockholder under Section 10(b) of the 1934 Act); *Stella v. Kaiser*, 81 F. Supp. 807 (S. D. N. Y. 1948); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). When it was not yet clear that a private suit could be brought under Section 10(b) of the 1934 Act, the Court of Appeals for the Ninth Circuit held that the far-reaching policy of the laws compelled recognition of the individual's right to sue as an enforcement technique. Civil liability would "deter fraudulent practices" by establishing the "right of defrauded sellers or buyers of securities to seek redress in damages in federal courts." *Fratt v. Robinson*, 203 F. 2d 627, 632 (C. A. 9th 1953).

It is clear, as a matter of statutory policy, that the motives, purposes, character, nature, understanding and knowledge of the plaintiff have nothing whatever to do with the propriety of an action. The statutes are designed to protect the public generally, and any aggrieved investor or buyer or seller of securities (who need not even be a stockholder) may seek redress. "The civil liabilities imposed by the Act are not only compensatory in nature but

also *in terrorem*. They have been set high to guarantee that the risk of their invocation will be effective in assuring that the 'truth about securities' will be told." Douglas and Bates, "The Federal Securities Act of 1933," 43 Yale L. J. 171, 173 (1933).

The *in terrorem* effect sought by the 1933 Act was directed at corporate management's conduct, not toward aggrieved stockholders. It would be surprising, therefore, if the *rules of procedure* applicable to enforcement of laws designed to protect the uninformed, gullible, and ignorant should be invoked to bar actions by such persons *because* they are uninformed, gullible, and ignorant in corporate affairs, and limited in their understanding of business and legal matters generally.

The decision of the Court of Appeals below represents a significant impairment of the right of a stockholder to bring to court a corporate cause of action against insiders. Although the decision below recognized that stockholders are proper instruments for bringing the cause to court, *it divided them into two classes*: stockholders who have the capacity to understand corporate transactions *and those who do not*. In effect, therefore, the Court of Appeals approved the dismissal of a meritorious cause of action simply because Petitioner, the plaintiff-stockholder, was too limited to understand what she was told about it by her advisors.

We urge to the contrary that an unknowledgeable stockholder is not unfit for the protection of the securities laws, whether suing individually or on behalf of the corporation.

B.

There Is an Equally Strong Public Policy in Favor of Stockholders' Derivative Suits.

The general state of affairs which has given rise to the necessity for permitting shareholders to sue on behalf of the corporation is stated succinctly in Sullivan, "The Federal Courts as an Effective Forum in Shareholders' Derivative Actions", 22 La. L. Rev. 580, 582 (1962):

. . . With the creation in the corporation of a new professional management group to steer its economic course, the stockholders have made possible the situation where the dog may bite the hand that feeds it. The management group has the tremendous power of the purse which it may exercise, as well as inside knowledge of the operations and intentions of the corporation. This concentration of power constitutes a severe test of the honesty and integrity of the managing group, and it is to be deplored, but expected, that some will succumb to the forbidden fruit.

There are, however, real obstacles to the effectiveness of stockholders' derivative suits as a means of remedying abuses and reducing temptation. Quite apart from statutory restrictions (cf. Sullivan, "The Federal Courts as an Effective Forum in Shareholders' Derivative Actions", 22 La. L. Rev. 580 (1962)), there is the practical problem that many stockholders—probably the overwhelming majority—are reluctant to sue. Among other reasons, "they usually know that the evidence is almost exclusively in the control of those who are charged with delinquency; that those same individuals are likewise in control of the funds of the corporation and they apply them in defense of their acts, whether those acts are innocent or wrongful; that in seeking a remedy the stockholder will be met with every obstacle and procedural delay that the ingenuity of skilled

counsel can devise. . .” *Dresdner v. Goldman Sachs Trading Corp.*, 240 App. Div. 242, 245; 269 N. Y. Supp. 360, 364-65 (1934).

A leading commentator, Hornstein, in “Legal Controls for Intra-Corporate Abuse—Present and Future”, 41 Col. L. Rev. 405, 425 (1941), has stated that, “tested functionally, the stockholder’s suit—while better than nothing—is of a low degree of efficacy.” Nevertheless, the author recognizes that this remedy is the best of a poor lot available in this area. Cf. Hornstein, “New Aspects of Stockholders’ Derivative Suits”, 47 Col. L. Rev. 1, 31 (1947).

In concluding his article on “The Federal Courts as an Effective Forum in Shareholders’ Derivative Actions, 22 La. L. Rev. 580, 603 (1962), Mr. Sullivan makes the following observations about the difficulties shareholder-plaintiffs face:

Under the very best of conditions the stockholder’s derivative action is a most difficult type of action. It suffers the infirmities of lack of information, substantial expense, difficulty of proof, and the unfortunate situation of facing the full majesty of the corporate power in support of the very individuals who have wronged the corporation. It is not a perfect remedy by any means, but it is the only effective remedy available to the stockholder who wishes to raise his voice against an abusive power by the management forces.

The federal courts are an available forum for such suits and Congress has attempted to make the task of bringing derivative actions into the federal courts an easier one than is the lot of the average case. That this has not succeeded completely is due to unfortunate lapses in statutory drafting which has opened the door to strained and restrictive interpretations on the part of some of the courts.

Similar views have been stated by the courts. Thus, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 548 (1949), this Court stated:

This remedy born of stockholders' helplessness was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that without it there would be little practical check on such abuses.

See also *McClure v. Borne Chemical Company*, 292 F. 2d 824, 827 (C. A. 3d 1961), cert. den., 368 U. S. 939 (1961); *Levitt v. Johnson*, 334 F. 2d 815 (C. A. 1st 1964); *Palmer v. Morris*, 316 F. 2d 649 (C. A. 5th 1963).

C.

The Significance of the Federal Securities Acts and of Derivative Suits as Essential Means for Protecting the Nation's Investors Is Highlighted by the Growing Number of Uninformed Small Shareholders.

The inherent technical and practical limitations on the bringing of derivative suits become even more significant in view of the fact that certain classes of shareholders, by virtue of educational and other natural limitations, have built-in infirmities which help to insulate corporate insiders against attack from the "outside". For example, according to *Shareownership U. S. A.*, the New York Stock Exchange 1965 Census of Shareowners, more than 50 per cent of the individual shareholders in this country are women and children. Indeed, the largest class of shareholders by occupation (34.7%) consists of housewives and non-employed women. While it is obvious that some women are knowledgeable in matters of corporate management, it would appear to be equally obvious that many of them, like the Petitioner in this case, are uninformed and ignorant in

such matters. From an educational standpoint, the New York Stock Exchange survey discloses that, excluding 1,280,000 shareholders who are minors, 3,106,000 shareholders (16.8% of all shareholders) have completed three years of high school or less. Moreover, nearly one-fourth (23.4%) of all individual shareowners are either under the age of 21 years (6.5%) or 65 years and older (16.9%). It is not far-fetched, especially in light of the proceedings below, to recognize that shareholders in these classifications would have a most difficult time withstanding the pressures and tactics of corporate counsel if they should undertake to bring derivative actions.

On the basis of the foregoing statistics, there are clearly large groups of American shareholders which would be blocked from attacking management irregularities if the rules regarding derivative actions are to be interpreted in such a manner as to require any measure of sophistication, and personal knowledge or understanding. Surely the right to sue to check corporate abuse should not depend on how much a shareholder *personally* knows or understands, without regard to his honest reliance on advisors and counsel.¹²

12. "It is probably no exaggeration to say that in many cases the transactions are so complicated that even skilled accountants and attorneys, informed that the corporation has been abused, find it impossible to unravel the intricacies and discover the nature of the wrong before suit is barred by the statute of limitations." Hornstein, "Legal Controls for Intra-Corporate Abuse—Present and Future", 41 Col. L. Rev. 405, 420 (1941).

D.

The Growing Practice of Corporate Tender Offers Can Only Be Policed by Stockholder Suits.

In recent years liquid funds in corporate treasuries have accumulated to such an extent that, under various circumstances, they represent an attractive, indeed lucrative, market for the sale of the corporation's own securities.¹³ Tenders to the corporation itself are phenomena of increasing frequency. They apparently do not require registrations, prospectuses, and all other complications and costs of secondary offerings by shareholders to the public. They are available when, as in 1962, the stock market is depressed. In some cases, as here, "bail-outs" may be attempted without even seeking stockholder approval. In light of the decision below, they may be invulnerable to stockholders' redress if the stockholders cannot personally understand or explain what the insiders have done.

During the decade 1954 through 1963, 651 different companies listed on the New York Stock Exchange participated in reacquisitions of their own common shares.¹⁴ These

13. Total corporate net current assets in billions of dollars have increased as follows:

| | |
|------|-------|
| 1945 | 51.6 |
| 1955 | 103.0 |
| 1963 | 151.2 |

Corporate surpluses in billions of dollars have increased as follows:

| | |
|------|-------|
| 1940 | 49.0 |
| 1950 | 129.4 |
| 1960 | 268.6 |

U. S. Bureau of the Census, *Statistical Abstract of the United States*: 1964, p. 493 (1964).

14. In 1963 alone, the amount spent by corporations listed on the New York Stock Exchange, 1.3 billion dollars, to repurchase their own securities, exceeded the amount of money raised in that year by such corporations from the sale of their own shares. Fleck, "Corporate Share Repurchasing: An Informed Discussion," 41 Harv. Bus. School Bull. 10 (1965).

companies represent 53 per cent of the total of approximately 1,200 corporations listed on the Exchange at the present time. In no single year of the ten studied did the total number of shares repurchased fall short of the amount reacquired during the preceding year. In terms of estimated dollar cost to repurchasing companies, there was an increase during the relevant decade from 274 million dollars in 1954 to 1,303 million dollars in 1963. Guthart, "More Companies are Buying Back Their Stock," 43 Harv. Bus. Rev. 40, 42-44 (March-April 1965).

Over the same period, numerous New York Stock Exchange companies engaged in general tender offers. All in all, approximately eight million shares were reacquired by listed companies in this fashion. Guthart, *op. cit.*, 53.

Where a corporation goes into the market to repurchase its own shares, without first communicating with shareholders, it *may* be subject to the anti-fraud provisions of Rule 10(b)-5, where the repurchase is for an improper purpose and such facts are not disclosed to the public. Where the corporation at the behest of management buys stock through a tender offer made generally to its stockholders, or redeems the stock of particular stockholders, it is clear that the company is subject to the anti-fraud provisions, since it has a duty to make adequate disclosure of any facts that would affect the investment judgment of the selling shareholders. See, e.g., *Kohler v. Kohler Company*, 319 F. 2d 634 (C. A. 7th, 1963); Kennedy, "Transactions by a Corporation In Its Own Shares," 19 Bus. Law 319 (1964). The problem is more troublesome and possible misdeeds are more serious when the corporation, as in this case, communicates directly with its shareholders for the purpose of soliciting the sale of their stock. One writer has recently expressed the belief that, under some circumstances, tender offers should be attended by "some sort of 'reverse prospectus'." Israels, "Corporate Purchase of

Its Own Shares—Are There New Overtones?" 50 Cornell L. Q. 620, 621 (1965).

At the present time, the SEC does not prescribe any standards for disclosure in communications to stockholders concerning tender offers. The SEC's Proxy Rules would, of course, compel relevant information, but if the corporation does not submit the matter to stockholders those Rules do not come into play. In the case now before this Court, the Hilton Hotels Corporation did not seek or obtain stockholders' approval of its tender offers. See Count VI of the complaint (R. 34-38).

In the light of the tremendous increase in corporate repurchases of shares and the use of tender plans, stockholders' challenges are a healthy response. Insofar as shareholders seek to combine the derivative suit and the anti-fraud provisions of the Federal Securities Acts, as Petitioner's complaint has done here, they are utilizing the best weapons available. Certainly, until the law requires a "reverse prospectus," there is no other way to prevent tender offers from becoming a major device whereby insiders may improperly use corporate funds.

The Court of Appeals below, however, appears to view the protection of corporate management against possible ill-founded suits as a mandate of the Federal Rules transcending strong federal policies in favor of stockholder actions. In this fashion it treated its own dubious interpretation of a procedural requirement as more important than major Congressional objectives for policing the securities markets.

III.

EVEN IF PETITIONER'S VERIFICATION WERE IMPROPER OR IN ANY SENSE FALSE, THAT CIRCUMSTANCE WOULD NOT WARRANT DISMISSAL.

In dismissing the cause, the District Court made no mention of Rule 41 (b) of the Federal Rules (R. 156-58). On appeal, however, the Court of Appeals stated that "The court below had inherent power to dismiss this complaint because of plaintiff's non-compliance with [Rule 23 (b)]", citing Rule 41 (b) (R. 238).

A strict and technical application of Rule 41 (b) in the circumstances presented in this case is contrary to the spirit and purpose of the Federal Rules of Civil Procedure. Rule 1 expressly states that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." As Professor Moore has noted, "liberality is the canon of construction." 2 Moore, *Federal Practice*, ¶ 1.13, p. 57. Moreover, in its grant of authority to establish the Federal Rules of Civil Procedure for the district courts, Congress was careful to provide that the Rules "shall not abridge, enlarge or modify any substantive right . . ." 28 U. S. C. Sec. 2072 (Rule-Making Statute). Recognizing the inherent limitation, this Court has declared that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U. S. 552, 557 (1941). Rules are not to be pushed so far as to bar on technical grounds a plaintiff from maintaining an action. *Washington Southern Nav. Co. v. Washington & Philadelphia Steamboat Co.*, 263 U. S. 629 (1924); *Perry v. Allen*, 239 F. 2d 107 (C. A. 5th 1956); *King v. Stuart Motor Co.*, 52 F. Supp. 727 (N. D. Ga. 1943).

Along the same lines, the Court of Appeals itself elsewhere disapproved of the dismissal of an action as a result of strict application of Rule 41, stating that the dismissal would produce injustice and that the Rule is not "a means of entrapment of the plaintiff." *Madden v. Perry*, 264 F. 2d 169, 175 (C. A. 7th 1959). One of the cases cited (R. 238) by the Court of Appeals in support of its view that Rule 41 (b) was properly invoked, *Meeker v. Rizley*, 324 F. 2d 269, 271-72 (C. A. 10th 1963), emphasizes that "the law favors the disposition of litigation on its merits . . . Dismissal is a harsh sanction and should be resorted to only in extreme cases."

These principles are meaningful in the present circumstances. Where the Petitioner filed a verification which is challenged as "false" solely because her subjective understanding is inadequate and her ability to recall and state on deposition what her son-in-law sought to explain to her is deficient, there is no failure of verification sufficient to warrant dismissal of the action. Especially is this true where the record indicates a careful examination of the information available to stockholders, and detailed substantiation of the allegations, by her legal counsel and her family-advisor son-in-law. The more limited the education and understanding of the Petitioner, the more it would seem she is entitled properly to rely on trusted agents whose competence in financial and legal matters may be greater. In *Murchison v. Kirby*, 27 F. R. D. 14 (S. D. N. Y. 1961), where a sophisticated and experienced stockholder, upon deposition, denied knowledge concerning allegations in his derivative suit, the court held that there was no basis for dismissal.

As a review of the many cases in which Rule 41 (b) has been invoked indicates, its primary use has been in instances involving failure to prosecute or disobedience to court orders. See, e.g., *Link v. Wabash R. Co.*, 370

U. S. 626 (1962); cf. 5 Moore, *Federal Practice* ¶ 41.12, pp. 1138-40. While Rule 41 (b), by its express terms, authorizes "an adjudication upon the merits," it has been generally recognized that only in aggravated situations should the Rule be so used. Cf. *O'Brien v. Sinatra*, 315 F. 2d 637 (C. A. 9th 1963); *Grunewald v. Missouri Pac. R. Co.*, 331 F. 2d 983 (C. A. 8th 1964); *Pierdon v. Chapman*, 169 F. 2d 909 (C. A. 3d 1948); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F. 2d 910, 914 (C. A. 2d 1959). In *Package Machinery Co. v. Hayssen Mfg. Co.*, 266 F. 2d 56, 57 (C. A. 7th 1959), the Court of Appeals commented on the "almost inexhaustible patience of the district judge."

This Court has noted that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause". *Societe Internationale v. Rogers*, 357 U. S. 197, 209 (1958); *Hovey v. Elliott*, 167 U. S. 409 (1897); *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1909). The distinction which runs through these cases—that summary disposition of a cause does not violate due process of law if the "essential basis" for the court's action is something more than "mere punishment", namely, a presumption as to bad faith and untruth to be drawn against the party who has failed to produce documents or to comply with some court order—indicates that the courts below, realistically, came very close to imposing punishment upon Mrs. Surowitz in the *Hovey v. Elliott* sense.

Far from suggesting that it was in any way drawing any inferences against the validity or truth of any of the allegations of the complaint, the Court of Appeals expressly conceded that "many of the material allegations of the complaint are obviously true and cannot be refuted" (R. 236). Moreover, it indicated that, were the contention advanced that the complaint was a sham pleading "in

the sense that it was without arguable foundation", the affidavits of Mr. Rockler and Mr. Brilliant would be controlling and would refute the merit of such a motion (R. 237-38). It also recognized that those affidavits revealed "that substantial and diligent investigation . . . preceded the filing of this complaint" (R. 237). Thus, insofar as the Court of Appeals indulged in any presumptions with respect to the solidity and truthfulness of the allegations in the complaint, it accepted them at face value. It is therefore difficult to characterize what the Court of Appeals approved other than as a species of punishment imposed on Petitioner for knowing so little when her deposition was taken. Needless to say, the meaning of this result will not be lost on other corporate defendants challenged by minority stockholders of limited comprehension.

One may well question whether the "punishment" fits the "crime". In *Leedom v. Int'l Union of Mine, Mill & Smelter Workers*, 352 U. S. 145 (1956), it was held that the NLRB had no authority to "decomply" a union even in a case where false swearing on a Section 9 (h) affidavit was properly found. Cf. *Farmer v. United Elec., Radio & Machine Workers*, 211 F. 2d 36, 39 (App. D. C. 1953).

In a case such as this, awareness of most of the matters is peculiarly within the defendants' knowledge. For defendants to expect to extract the facts from Petitioner personally, or for the courts below to insist that Petitioner's comprehension of certain facts was necessary to give the complaint "the breath of life" (R. 238), is, in a derivative suit complaining of violations of the Federal Securities Acts, completely unrealistic and unreasonable. Cf. *Lance, Inc. v. Ginsburg*, 32 F. R. D. 51 (E. D. Pa. 1962).

Instead of dismissing, the District Court, once satisfied that the complaint was not a sham and that counsel had complied with the requirements of Rule 11, should have required defendants to answer.

CONCLUSION.

For the foregoing reasons, Petitioner prays that the decision of the Court of Appeals be reversed and that the cause be remanded with instructions to reinstate the complaint and to require the defendants to answer.

Respectfully submitted,

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APPENDIX A.

STATUTORY PROVISIONS INVOLVED.

Securities Act of 1933 (15 U. S. C. Sec. 77a et seq.)

SEC. 12. Any person who—

* * * * *

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

SEC. 17(a). It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Exchange Act of 1934 (15 U. S. C. Sec. 78a et seq.)

SEC. 9(a). It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

* * * *

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

* * * *

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue

in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX B.

**FEDERAL RULES OF CIVIL PROCEDURE
INVOLVED.**

Rule 11—Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 23—Class Actions.

(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce

rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

Rule 41—Dismissal of Actions.

(b) *Involuntary Dismissal; Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

DEC 24 1965

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161

DORA SUROWITZ, Individually and on behalf of all other
similarly situated shareholders of HILTON HOTELS CORPO-
RATION, *Petitioner,*

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD
N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAV-
ERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY
CROWN, HORACE C. FLANIGAN, BENNO M. BECHHOLD,
Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE
STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON
HERNDON, HERBERT C. BLUNCK, CHARLES L. FLET-
CHER, ROBERT A. GROVES, JOSEPH A. HARPER,
BARRON HILTON and HILTON CREDIT CORPORATION,
a corporation, *Respondents.*

BRIEF FOR RESPONDENT HILTON HOTELS CORPORATION.

LESLIE HODSON,
DON H. REUBEN,
LAWRENCE GUNNELS,
of

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161.

DORA SUROWITZ,

Petitioner,

vs.

HILTON HOTELS CORPORATION, *et al.*,

Respondents.

**BRIEF FOR RESPONDENT HILTON HOTELS
CORPORATION.**

MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT.

We respectfully submit that the decision below should be affirmed.

The "sworn" complaint accuses the corporate management of gross fraud and self-dealing; such accusations, if irresponsibly lodged, wrongfully tarnish the corporation's image and impair its standing with the public and the business community. Mrs. Surowitz' deposition reveals beyond cavil that she has no knowledge, information nor belief concerning *any* of the accusatory allegations of the complaint. Moreover, she has no awareness of even the simplest and most fundamental elements that any interested and bona fide plaintiff (no matter how unsophisticated)

would have, *i.e.*, whom she was suing, what basic wrong she was charging, and the relief she was seeking.¹

Mrs. Surowitz' son-in-law, one Irving Brilliant, instigated and apparently contrived the suit, for the record shows:

First, Brilliant told Mrs. Surowitz that *he* "would like to take action" against the corporation (R. 110);

Second, Brilliant retained the lawyers (R. 122);

Third, Brilliant arranged the financing of the action (R. 120-21, 123);

Fourth, Brilliant "told" Mrs. Surowitz to execute the verification (R. 96);

Fifth, Brilliant "was the one who knew all about it" and the lawyers dealt solely with Brilliant (R. 107, 120-24);

Sixth, Brilliant could have filed the suit himself (or later joined as plaintiff) since he was a legal owner of Hilton stock, but for some undisclosed reason he does not care to be a party to the suit (R. 120-24, 107);

Seventh, Mrs. Surowitz has no information nor cognizance of any of the complaint's accusations and has no reason whatsoever to question the honesty or integrity of any of the defendants (R. 107, 105).²

1. The complaint, although needlessly voluminous, accuses the individual defendants of the simple fraud of selling their private stock holdings to the Hilton Hotels Corporation at an artificially inflated price (R. 1-64).

2. Brilliant's affidavit states that he acts as an investment advisor to various persons and firms (R. 120). The affidavit also states that Brilliant has volunteered financial advice to his mother-in-law, Mrs. Surowitz, for several years and that she relies heavily upon his advice (R. 121-22). Mrs. Surowitz, when asked at her deposition what Brilliant's business or occupation was, replied "I don't know what he is doing." (R. 95.)

SUMMARY OF ARGUMENT.

The record plainly reveals, and both of the lower courts found, that Mrs. Surowitz was a "plaintiff" in name only; she in fact simply loaned her name and her "oath" to Brilliant. We do not believe that a decision here condoning and upholding a complaint so sworn can be reconciled with either Rule 23(b), or indeed, with the basic concepts of our adversary system of justice. Nor do we believe that sanctioning such a meaningless verification would be compatible with the interests of this or any corporation and the class of all shareholders upon whose behalf derivative suits are brought. Quite the contrary, allowing this action to proceed upon such a record would only resurrect the many and intolerable abuses that Rule 23(b) was specifically enacted to correct.

Petitioner's counsel could have easily eliminated all controversy concerning the false verification by amendment, substitution or otherwise; the record shows that the trial court expressly and repeatedly afforded every opportunity to do so. In the face of counsel's persistent refusal of all such opportunities, dismissal below was plainly warranted.

ARGUMENT.

I. The Complaint Was Properly Dismissed Because of the Plaintiff's Complete Lack of Knowledge and Control of the Suit.

The petitioner's absolutely meaningless "verification" of the complaint's accusatory allegations plainly violated Rule 23(b); a claim to the contrary is tantamount to rendering the verification requirement of the Rule an idle gesture. The petitioner's brief candidly admits, as it must, that "The grammar of the Rule—both as originally written and as it now is embodied in Rule 23(b)—indicates that the *entire complaint* in a derivative suit is to be verified."³ (Petr. Br. p. 30; emphasis added.)

Petitioner's brief, however, urges this Court to construe Rule 23(b) contrary to its plain language; petitioner contends that public policy considerations are best served by restricting the verification requirement to the formal and innocuous allegations concerning plaintiff's stock ownership, non-collusiveness and prior demand for redress (Petr. Br. pp. 22-34). Apart from the fact that the peti-

3. Rule 23 (b) provides in pertinent part:

"In an action brought to enforce a secondary right on the part of one or more shareholders . . . the complaint *shall* be verified by oath *and* shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." (Emphasis added.)

tioner's argument is directly opposed to the history and judicial gloss of Rule 23(b) (see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541), we submit that petitioner's policy complaints are in truth nothing more than a request for redrafting of Rule 23(b) in this proceeding. In the past when this Court has been asked to amend a Federal Rule by judicial declaration the request has been specifically rejected.⁴ We believe the Court should do likewise here, particularly when the alleged necessity for petitioner's request (i.e., that although petitioner verified, she left all cognizance and control of the suit to an intermediary, Brilliant) arises because of conduct condemned by Canon 35 of the Canons of Professional Ethics.⁵ We submit that if circumstances ever arise to warrant redrafting and revising Rule 23(b), it would not be upon a record such as here.

4. See, e.g., *United States v. Robinson*, 361 U. S. 220, 229, where the Court declared:

"That powerful policy arguments may be made both for and against greater flexibility [of Rule 45(b)] is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision."

See also *United States v. Isthmian S. S. Co.*, 359 U. S. 314.

5. Canon 35 provides:

"The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. *He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.* A lawyer's relation to his client should be personal, and the responsibility should be direct to the client." (Emphasis added.)

See A. B. A. Opinions of Committee on Professional Ethics and Grievances, Opinions Nos. 32, 98, 237 (1957).

Petitioner also seeks a reversal on the ground that the decision below penalizes her because she is poorly educated and has a limited grasp of corporate transactions; she urges that more and more unsophisticated persons are becoming shareholders and that the decision below will prevent their maintaining derivative suits (Petr. Br. pp. 39-49). The courts below, however, did not dismiss the suit because of petitioner's lack of sophistication or formal schooling. Rather, the Court of Appeals declared *only* that a plaintiff swearing to a complaint under Rule 23(b) should have *minimal* "knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges." (R. 239.)

Such a criterion is no more stringent than the rudimentary awareness that is required to sign a will, a promissory note, or a contract or to do any other act incidental to the ordinary and day-by-day affairs of life. (See *Kendall v. Ewert*, 259 U. S. 139; *Stockmeyer v. Tobin*, 139 U. S. 176; *Turley v. Turley*, 374 Ill. 571, 30 N. E. 2d 64; *Hillman v. Huitt*, 249 Mich. 1, 227 N. W. 729; *American Law of Property*, Vol. III, § 12.69 (1952).) Clearly, nothing less than that kind of minimal knowledge can assure that derivative plaintiffs have some semblance of personal relationship to the suits they swear are true and bring as fiduciaries. We submit that condoning a derivative action sworn by one who is totally uninformed, indifferent and unheeding would be to eliminate the necessity of actual plaintiffs and allow derivative suits to be filed and managed solely by lawyers or brokers.

Indeed, this Court has itself pointed out, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, that the shareholder's derivative action has a long and inglorious history of being used by lawyers or "strike suitors" for nefarious and ulterior purposes detrimental to the rights

of the corporation and its shareholders; Rule 23 (b) was expressly designed to curb such abuses. The Court declared in *Cohen* (337 U. S. at 548-49):

"[Derivative] suits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value . . . These litigations were aptly characterized in professional slang as 'strike suits.' . . . [A] stockholder who brings suit on a cause of action derived from the corporation *assumes a position, not technically as a trustee perhaps, but one of a fiduciary character.* . . . The interests of all in the redress of the wrongs are taken into his hands, *dependent upon his diligence, wisdom and integrity.*" (Emphasis added.)

See, to the same effect, *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F. 2d 257, 265 (9th Cir.); *Gottesman v. General Motors Corp.*, 28 F. R. D. 325, 326 (S. D. N. Y.); Wood, *Survey and Report Regarding Stockholders' Derivative Suits*, pp. 58-61 (1944). Accordingly, enforcement of Rule 23(b) as it is written protects *both* the unsophisticated shareholder *and* his corporation from becoming the victims of the unscrupulous who prosecute (or settle) derivative suits solely according to the dictates of self-enrichment. And at the same time, the Rule plainly does not discourage or inhibit the bringing of meritorious derivative suits.

We freely concede that in areas where unwarranted and unjust barriers have arisen to thwart the filing of a lawsuit, the traditional relationship of the plaintiff to his suit has been somewhat relaxed (*i.e.*, in civil rights litigation and railroad personal injury suits.) See *NAACP v. Button*, 371 U. S. 415; *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U. S. 1. However, the exact opposite kind of abuse has occurred in the area of shareholders' derivative suits and opposite considerations apply. The derivative suit has a long history of being recklessly lodged in the names of paper plaintiffs solely for the en-

richment of lawyers and their lay confederates; this sordid background has prompted the imposition of a number of special safeguards (including Rule 23 itself) to prevent misuse of the derivative action.⁶ See *Cohen v. Beneficial Industrial Loan Corp.*, *supra*; *Home Fire Ins. Co. v. Barber*, 67 Neb. 604, 93 N. W. 1024; 4 Thompson, *Corporations*, Sec. 4571 (1895). Thus, the reading of Rule 23(b) in its plain terms (all that the lower courts have done here) allows free access to the courts in derivative actions without regressing to the era when the suit was an instrument of intolerable abuse and exploitation.

We submit that the petitioner has not justified allowing her to proceed with what is in fact no verification; nor has petitioner given any valid reason for rewriting Rule 23(b). As construed by the courts below, the verification requirement is met by a plaintiff's minimal awareness of what basic wrongdoing is alleged and who committed it. No easier nor fairer standard is conceivable before one should be allowed to sue in a fiduciary capacity on behalf of all fellow shareholders.

6. "The fact that the great preponderance of stockholder's derivative actions are unfounded and the wholesale charges of wrong-doing commonly made are seldom proven is confirmed and reflected in the changed attitude of the courts. . . . [D]ecisions [reflecting this attitude] are, by ordinary standards, strict, and come close to the line of requiring the pleading of evidence. *It is, however, only the natural result that the flood of unfounded litigation and irresponsible charges of wrongdoing in these cases have compelled recourse to extra rigid standards of pleading.*" Wood, *Survey and Report Regarding Stockholders' Derivative Suits* (1944), pp. 58, 60-61 (emphasis added).

II. Dismissal of the Action Was Appropriate Because of the Failure to Amend or Substitute.

The petitioner's brief seeks the impression that the District Court abruptly and summarily dismissed the complaint upon discovery of the false verification, without affording any opportunity to cure the defect (Petr. Br. pp. 4, 15-16, 50-53). But the record totally repels this contention. Prior to the final order of dismissal the trial judge gave the petitioner's attorneys repeated and painstaking invitations to do or file anything they considered appropriate to save the complaint.

When the motion to dismiss was first filed the trial court allowed petitioner fifteen days to file "such documents as her counsel might think appropriate in opposition to the motion." (R. 172.) At the oral argument upon the motion to dismiss, the trial judge made pointed and repeated references to the ease of correcting the defect:

"[I]t seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff." (R. 175-76.)

"[I]t is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? . . . It seems to me that would have been the simple way to do the thing properly." (R. 185.)

Petitioner's counsel, however, flatly refused all such suggestions and elected to stand upon the original veri-

fication. Several possible alternatives, or a combination of them, were manifestly available:

- (1) Brilliant (a legal owner of Hilton stock and "the one who knew all about it") could have joined or substituted as verifying plaintiff;
- (2) Brilliant could have tendered a substitute verification;
- (3) Brilliant's wife or another member of his family who owned Hilton stock could have joined or substituted as verifying plaintiff;
- (4) Any other Hilton stockholder could have joined or substituted as verifying plaintiff.

Although petitioner's brief urges that dismissal of the complaint was an unduly severe sanction to impose for the violation of Rule 23(b), the brief does not suggest any other alternative that the trial court could have followed (other than adopting the view of petitioner's counsel that *no* violation of Rule 23(b) had in fact occurred) (Petr. Br. pp. 50-53). Indeed, all of the alternatives other than dismissal were solely within the hands of petitioner's counsel (and Brilliant); instead of easily eliminating any further controversy over whether plaintiff's false verification violated Rule 23(b), counsel dogmatically insisted upon an immediate ruling on the question by the trial court. Having received it, they are in no position to complain now that the sanction imposed by the trial court was too onerous, particularly when they did not suggest any milder form of remedy either before or after the judgment. See *Johnson v. Brandon Corp.*, 183 F. 2d 444 (4th Cir.); *Package Machinery Co. v. Hayssen Mfg. Co.*, 266 F. 2d 56 (7th Cir.).

Conclusion.

For the foregoing reasons we submit that the decision below should be affirmed.

Respectfully submitted,

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No. 101

FILED

CLERK

U.S. DISTRICT COURT

Supreme Court of the United States

October Term, 1961

DORA SUBOWIEK

Individually and on behalf of all other similarly situated shareholders of **HILTON HOTELS CORPORATION**,

Plaintiff,

vs.

HILTON HOTELS CORPORATION, a corporation, **GERALD E. HILTON**, **ROBERT F. WILLIFORD**, **ROBERT J. GAYNE**, **JOSEPH F. KINGS**, **STEWART HILSON**, **WILLIAM H. HOBBS**, **MORRIS C. FLANNERY**, **EDWARD E. HICKMAN**, **E. JAMES FREEMAN**, **WILLARD W. KIRBY**, **LAWRENCE H. HARRIS**, **EDWARD D. YOUNG**, **FRANK E. BROWN**, **VERNON HARRISON**, **ROBERT C. BLUMEN**, **CHARLES L. FARMER**, **EDWARD A. GROVES**, **JOSEPH A. HARPER**, **MARION HARRIS** AND **HILTON CREDIT CORPORATION**, a corporation,

Defendants.

BRIEF OF INDIVIDUAL RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, **CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON AND HILTON CREDIT CORPORATION,** a corporation,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS

NATURE OF THE CASE.

The instigator of this case is not before this Court. Instead, a puppet plaintiff has been induced to execute a false verification. This is established by a comparison

of petitioner's verification of the complaint with her sworn testimony on deposition. Condonation of such conduct will nullify the adversary concept of jurisprudence and Rule 23(b) of the Federal Rules of Civil Procedure.

The only suit which could be affected by the judgment of the Court of Appeals herein is one in which, as here, a false affidavit was filed by a puppet plaintiff who had, quite literally, no idea whatsoever of the general nature of the wrongful acts alleged, nor of her relationship to the suit, nor of the official identity of the defendants charged with serious wrongs. It is that amalgam of false affidavit and puppet plaintiff that makes essential the duty of this Court to enforce the Federal Rules of Civil Procedure, not to encourage nor discourage stockholder litigation, not to advance nor to hinder the enforcement of the Securities Acts, but to establish standards of conduct for *all* plaintiffs that will prevent fraud upon the Federal Courts.

QUESTIONS PRESENTED

Petitioner's brief states the "Questions Presented" as if the dismissal here was based upon her ignorance and lack of sophistication. (Pet. Br. 2).

It is respectfully suggested that the questions presented here are as follows:

1. The complaint was verified by a plaintiff who had no knowledge, information, understanding, or familiarity concerning its accusatory allegations or its subject matter. Were the trial court and Court of Appeals correct in holding that such a verification in a stockholder's derivative action which stated under oath that the affiant had either

knowledge, or information and belief, as to all allegations of the complaint is a false verification and a violation of the requirements of Rule 23(b)?

2. If a plaintiff in a derivative action files a false verification in violation of Rule 23(b) and refuses to substitute a proper verification, is the trial court correct in dismissing the action?

3. Does the adversary concept of litigation require that a plaintiff, who files and verifies in her own name a stockholder's derivative suit charging gross misconduct by corporate managers, have some concept of the nature of her charges, or are puppet plaintiffs to be condoned in lawyer-investment counsel instigated litigation?

STATEMENT OF THE CASE.

Petitioner devotes seven pages (Pet. Br. 4-11) to a summary of the allegations and charges contained in the complaint itself (as distinguished from the petitioner's verification of the complaint). These allegations and charges have no relevance on this appeal. No issue is presented concerning the truth or falsity of any of the charges in the complaint. The appeal concerns only the correctness of the legal determination by both the trial judge and the Court of Appeals that petitioner both failed to comply with the verification requirements of Rule 23(b) and also filed with the court a pleading containing an utterly false verification. The facts of this case compel the conclusion that the decisions of the lower courts were correct.

1. The Verification

The truthfulness and sufficiency of the verification is the central issue in this appeal, yet petitioner's brief nowhere quotes the language of that critical oath, which is as follows:

"Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing Complaint by her attorneys subscribed and is familiar with the matters therein alleged; that as to the matters alleged in [33 specified paragraphs of the complaint] said allegations are true and correct. That as to all other matters alleged in the above and foregoing Complaint, she makes said allegations on information and belief and believes them to be true."
(R. 64)

In this verification petitioner swore to the truth of the following matters: (1) that she had read the complaint and was familiar with the matters therein alleged; (2) that of *her own knowledge* the allegations in 33 specified paragraphs of the complaint were true; (3) that *she* possessed information as to the truth of each other allegation of the 91 page complaint and that *she* believed each such allegation to be true.

The sworn testimony of Mrs. Surowitz herself demonstrates conclusively that as to each of these matters her verification was utterly untruthful.

2. The Petitioner's Deposition

Petitioner's deposition, as the trial court and the Court of Appeals found, demonstrated conclusively the sham character of the verification, and of this case as brought by the named plaintiff. The actual testimony of Mrs. Surowitz makes clear Mrs. Surowitz' status as a puppet in this case and her utter lack of any knowledge, information, understanding or belief concerning the subject matter of the complaint.

Petitioner has attempted, by omission, by misstatement and by interpolation of factual matters from sources other than her own deposition to convey the impression that petitioner had some knowledge and understanding of the subject matter of her complaint, and has been penalized by dismissal of her suit solely because she lacked such education or sophistication as would permit her to comprehend the intricacies of corporate finance. Nothing could be further from the facts of this case. *Petitioner had no knowledge or understanding of the basis of her suit.*

a) Plaintiff's Testimony Demonstrated That She Had No Familiarity with the Subject Matter of the Action Even on the Most General or Rudimentary Level.

In addition to questions about specific allegations of the complaint, referred to below in b) and c), the petitioner was asked a series of questions concerning the subject matter of the action *in general*, and the basis of the serious charges she had made against the officers and directors of the corporation. Her answers confirmed the falsity of her verification, and demonstrated that she had so accepted the role of a puppet that she had *no familiarity* with these charges or *with the subject matter of the action*, even in the most general or rudimentary way.

Mrs. Surowitz testified that she did not know any of the individual defendants and had no conversations or correspondence with them, with the exception of the protest letter. (R. 100-101) When she was asked if she knew anything at all about the individual defendants which would indicate that they were not in her judgment men of honesty and integrity, she responded:

“I don't know anything about them.” (R. 101)

She made this response despite the fact that the complaint she filed and verified charges these defendants with deliberate violations of a number of federal statutes, with disregard of their fiduciary obligations, and with a scheme to make substantial personal profits at the expense of their corporation—in short, with serious dishonesty.

Thereafter, on the same subject, Mrs. Surowitz was asked:

“Do you know of any action, wrongful or improper, done by any officers or directors of Hilton Hotels Corporation?” (All emphasis herein is supplied unless otherwise noted.)

Her response contains her sole effort to explain her understanding of the subject matter and charges in the complaint. She stated:

"I couldn't—all I know is that my stock wasn't right and that's all." (R. 105)

Yet charges of wrongdoing by those officers and directors constitute the gist of the complaint. Further, petitioner's standing to bring the action is predicated upon the contention that these alleged acts of misconduct gave rise to a corporate cause of action which the officers and directors of the corporation refuse to prosecute. Mrs. Surowitz knows nothing about or against any of these officers and directors, not even their failure to prosecute "her" cause of action.

On examination by her own counsel, Mrs. Surowitz testified, in response to leading questions, that she received from Hilton Hotels Corporation the documents attached to the complaint as Exhibits A, B and C, and that she turned these documents over to Mr. Brilliant. (R. 109) She did not indicate that she understood that these documents had any connection with the litigation or what the connection might be.

This testimony shows more than mere lack of "sophistication." It demonstrates that petitioner so completely accepted her role as a puppet that she never troubled to obtain even the most rudimentary information as to what "her" derivative action was all about. In this state of complete ignorance she recklessly filed an utterly false affidavit of verification.

b) Petitioner Did Not Know Facts Relating to the Allegations Which She Swore Were True as of Her Own Knowledge and Did Not Even Understand Such Allegations.

Mrs. Surowitz gave her home address and stated that she had owned, since about 1957, 100 shares of the stock of Hilton Hotels Corporation.* (R. 94, 96)

Thereafter, Mrs. Surowitz' response to *all* questions relating to the allegations she had sworn she *knew to be true* consisted substantially of "*I don't understand it and I don't know nothing about it.*" **No objection to the form of any question answered by petitioner was made by either of her two counsel present.**

Mrs. Surowitz was asked to state the basis upon which she swore to the correctness of the allegations to the effect that the individual defendants had control over the affairs of Hilton Hotels Corporation (paragraph 6 of Counts I, II, III, IV and V**). She answered:

"I don't understand it and I don't know nothing about it." (R. 102)

Petitioner's brief does not mention this question and answer, either in its "Statement of the Case" or in the argument concerning "Petitioner Truthfully Verified the Allegations Upon Which Her Standing to Sue Rests" (Pet. Br. 31-34) even though the fact of control is obviously relevant to the adequacy of the demand on the corporation and consequently to petitioner's standing.

* Even on this point Mrs. Surowitz was confused, since she incorrectly testified that the stock had been held in her own name throughout this period.

** The questions were phrased in the language of the Complaint which Mrs. Surowitz had sworn she **knew** to be true. For brevity this brief refers merely to Count and paragraph numbers.

Mrs. Surowitz was then asked about the allegations that a corporate offer to purchase stock dated December 17, 1962 contained certain reasons why the offer was being made and no other statement of reasons (paragraph 7 of Counts I, II, III, IV and V). She responded:

"I don't know nothing. I don't understand this and I don't know. I can't answer you on that. I don't know." (R. 103)

With respect to the allegation that the action was not a collusive one instituted to create jurisdiction in the District Court (paragraph 5 of Count VI), Mrs. Surowitz responded:

"I don't know. I can't tell." (R. 104)

Mrs. Surowitz was asked to state the facts upon which she swore to the truth of the allegations that she had protested to the defendant corporation against the gross impropriety of the acts set forth in the complaint (last sentence of paragraph 13 in Counts I, II, V and VI, the last sentence of paragraph 14 of Counts VII, VIII and XI, and last sentence of paragraph 12 of Counts IX and X). To a number of questions with respect to these allegations, she replied:

"I don't know." "I don't know nothing about it."
 "I don't know. I can't answer you on that neither because I don't know." "I can't. I don't know." "No, I don't understand it." (R. 103-104)

A few minutes before she made these answers, Mrs. Surowitz had identified her signature on a letter of protest (Defendants' Surowitz Deposition Exhibit No. 1) which had been sent in her name to Hilton Hotels Corporation. (R. 97) Counsel for the petitioner contend that this letter

was the basis for the allegations in the complaint that a protest had been made to the corporation. Mrs. Surowitz' disavowal of any knowledge concerning a protest only a few minutes after she had examined this letter, and her entire testimony, merely underscore her status as a puppet in this litigation. Such testimony compels the conclusion that she never understood the matters alleged in the complaint or the letter of protest which she signed at her son-in-law's direction. The lower courts so found.

The allegations verified as true of petitioner's own knowledge and referred to at pages 31-34 of petitioner's brief are only a portion of the allegations which Mrs. Surowitz swore she knew of her own knowledge to be true. Even as to the few allegations discussed in detail, the brief co-mingles answers given by Mrs. Surowitz in her deposition with assertions from the affidavits filed by Mr. Brilliant and her counsel and other material, in order to convey the impression that Mrs. Surowitz had some knowledge (however rudimentary) of the subject matter of the complaint. In fact, the record demonstrates the contrary.

- c) **Plaintiff Had No Information Upon Which To Form A Belief, and Did Not and Could Not Have A Belief, of the Truth of the "Information and Belief" Allegations, Which Allegations She Also Did Not Understand.**

Mrs. Surowitz was interrogated concerning the allegations as to which she had sworn she possessed information and believed to be true. She was first questioned about the allegation, made on "information and belief", that the explanation set forth in certain documents sent to shareholders of Hilton Hotels Corporation was false and misleading, and was *known by the individual defendants to be false and misleading* (paragraph 8 of Count I). She replied:

"I can't give it to you because I can't explain it to you and I don't know." (R. 105)

She was then asked to state the information upon which she formed the belief that defendants carried out a manipulative or deceptive device or contrivance as alleged in paragraph 8 of Count I. She replied:

"I can't explain it to you in my words. I don't know." (R. 105-106)

She was then asked concerning the allegation that the individual defendants were engaged in a plan and scheme to make it possible for them to dispose of shares in Hilton Hotels Corporation at prices more favorable than they could obtain in the market at a time when they knew or should have known that the business affairs of the corporation would shortly lead to a substantial drop in the value of the shares (paragraph 8(a) of Count I). She replied:

"I don't know. I can't explain it." (R. 106)

The second allegation of paragraph 8(a) of Count I charges that the individual defendants were engaged in a

plan and scheme to make it possible for the defendant Henry Crown to dispose of the large holdings in the common stock of Hilton Hotels Corporation held or controlled by him or his family, at prices above the market prices for such stock under circumstances whereby such disposal of stock would not become publicly known. Concerning the facts on which this allegation was based, Mrs. Surowitz stated:

"I don't know." (R. 106)

Mrs. Surowitz was then asked about the allegations that the individual defendants took the action previously described in such a way as to conceal from the corporation and the stockholders the true purpose of the offer to purchase stock, and in such a way as to make it appear that it was to the corporation's advantage to effect such a purchase of approximately 10 per cent of its outstanding shares (paragraph 8(b) of Count I). She replied.

"No, I don't know. I don't know." (R. 106-107)

These were all of the answers she gave concerning specific allegations of the complaint.

d) Petitioner's Answers Were Not the Result of the Technical Nature of Any Questions. Her Lack of Knowledge Was Total.

In this Court petitioner does not argue as a basis for reversal that Mrs. Surowitz' complete failure to indicate any understanding or information concerning the accusatory allegations of the complaint was based upon some failure of memory or the obscure nature of "technical questions" asked by counsel. The contention that "it was evident that Mrs. Surowitz had difficulty understanding several questions." (Pet. Br. 12-13) and other similar state-

ments scattered throughout the brief, however, represents an indirect effort to explain away Mrs. Surowitz' testimony on this ground. This attempted explanation of petitioner's testimony is utterly inconsistent with the record.

First, the uniformly uninformed character of Mrs. Surowitz' responses to all questions, complicated or simple, technical or non-technical, demonstrates to any reader of the deposition transcript that she possessed no secret knowledge waiting to be elicited by some more understandable or less complicated question.

Second, although two of petitioner's able counsel were present at the deposition, they did not object to the form of a single question answered by petitioner concerning the allegations of the complaint or the factual subject matter of the litigation. Having failed to object, the objection is waived. Rule 32(c) F.R.C.P. In addition, of course, the failure to object demonstrates that counsel believed that Mrs. Surowitz' answers accurately reflected the state of her knowledge and understanding.

Third, any such argument by petitioner's counsel is barred by their own stipulation. After the specific questions and answers summarized above, dealing with a few of the "information and belief" allegations of the complaint, the following took place:

(Mr. Block)

"Q. Do you know any facts, Mrs. Surowitz, at all upon which you based these allegations?

A. I don't know. I can't give you no facts because I don't understand it.

Mr. Block: Could we take a short recess, please?
(Whereupon a five-minute recess was taken.)

Mr. Block: Let the record show that Mr. Watt [counsel for plaintiff] and Mr. Block have now discussed the further questioning with respect to the information upon which the witness has formed the belief to which she swore and it is agreeable that I ask the following question:

By Mr. Block:

Q. Mrs. Surowitz, if I ask you about each of the other allegations of the complaint to which you have sworn on information and belief as being true and correct and that you believe them to be true and correct, your answer would be the same, would it not, that you have no information as to those?

A. I have no information because my son-in-law, I left it to him, and he was the one that knew all about it." (R. 107)

Plaintiff and her counsel thus conceded that she would respond to *any and all questions concerning the factual basis of any of the allegations in her lengthy complaint by a complete disavowal of any knowledge or information.*

Finally, although petitioner's own counsel undertook to examine her at the deposition, this examination elicited no testimony concerning any information, understanding, knowledge or belief by Mrs. Surowitz with respect to the subject matter of the action.

3. The Proceedings in the Trial Court Demonstrated the Determination of Petitioner's Counsel To Stand Upon the False Affidavit.

On the day following the Surowitz deposition, defendants presented to the trial court a motion to dismiss the action. In the colloquy between court and counsel at the

time the motion was presented, defendant's counsel clearly stated that the motion was based upon the demonstratively false character of the affidavit and upon plaintiff's failure to comply with the verification requirement of Rule 23(b). (R. 168-171). The trial court gave petitioner's counsel fifteen days to file such documents as counsel might think appropriate (R. 171-172). In response, petitioner's counsel merely filed the affidavits of petitioner's son-in-law, Irving Brilliant and Walter J. Rockler, one of petitioner's counsel. As the Court of Appeals properly concluded: "Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant knowledge or information other than the fact of her stock ownership." (R. 237-238).

All of the *facts* relating to *petitioner's* lack of knowledge, belief, or even understanding concerning her lawsuit have been referred to. They are contained in *her* affidavit and *her* testimony. Neither *her* affidavit nor *her* testimony, and assuredly not *her* knowledge, belief or understanding, are in any way changed by either the Rockler or the Brilliant Affidavit.

a) The Rockler Affidavit Is Irrelevant on the Issue of Whether or Not Mrs. Surowitz Filed a False Affidavit.

Mr. Rockler's affidavit is totally *irrelevant* to the question of the truthfulness of Mrs. Surowitz' affidavit. The Rockler affidavit shows that neither he nor any of petitioner's other counsel discussed the litigation or the complaint with petitioner prior to or at the time it was verified and filed. They dealt only with Mr. Brilliant. It was he who instructed them to draft the complaint. They forwarded the complaint to him and received it back with the verification form executed by Mrs. Surowitz (R. 142). The Rockler

affidavit therefore indicates that neither Mr. Rockler nor petitioner's other counsel had any knowledge with respect to the truthfulness of Mrs. Surowitz' verification.

b) The Brilliant Affidavit Is Similarly Irrelevant, But It Reveals The Genesis of the Litigation.

It appears from Mr. Brilliant's affidavit that he is everything Mrs. Surowitz is not. She is a "woman of limited education", a dressmaker who "reads very little English and has some difficulty in understanding English except with regard to ordinary day to day matters." She "does not have the education or experience to understand corporate and securities transactions." (R. 122). Brilliant, on the other hand, is a college graduate and a member of Phi Beta Kappa. In addition, he has a degree from Harvard Law School and a Master of Arts Degree in Economics from Columbia University. He has had ten years' experience "as an advisor to various individuals, institutions, and companies with regard to the proper investment of their funds." (R. 120).

While Mrs. Surowitz has not the slightest information or understanding with respect to the charges or subject matter of the complaint, Mr. Brilliant was the instigator and mastermind of this action. According to his affidavit, it was he who raised questions with respect to the two stock transactions referred to in the complaint. He personally conducted investigations at the New York Stock Exchange and communicated the results of those investigations to Mr. Rockler. It was Brilliant who instructed Rockler to prepare the complaint, with Mrs. Surowitz as plaintiff. (R. 122-124).

It also appears from the Brilliant affidavit that he, his wife and their families own in excess of 2,350 shares of the stock of Hilton Hotels Corporation, and that Brilliant himself is the record owner of some of these shares as trustee of a trust for his children or as the representative of his mother's estate. (R. 121).

The truth of these allegations would have led one to expect that this derivative action would have been brought by Mr. Brilliant himself, or, at the least that he would have verified the complaint. Instead, he procured his mother-in-law to act as plaintiff in the litigation, and told her that it "was reasonable to assume" that members of the family who own Hilton stock would "be willing to pay a major part of the expenses." (R. 123)

Brilliant does not relate the basis upon which he concluded that Mrs. Surowitz should verify the complaint or how her verification could be a truthful one. He states in conclusory fashion that he "explained" the complaint to Mrs. Surowitz, but gives no further details with respect to this "explanation." (R. 124). *He does not assert that he made any effort to ascertain whether Mrs. Surowitz had acquired sufficient information to enable her to make a truthful verification.* As the Court of Appeals found:

"Brilliant does state in his affidavit that he read the complaint to plaintiff before she signed it, but it seems obvious from her deposition that she had no conception of the matters read We think the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand." (R. 238).

Therefore, to the extent the Brilliant affidavit is relevant, it supports the dismissal of this action.

c) Neither the Brilliant Nor the Rockler Affidavits Could Constitute That Verification Required by Rule 23(b).

1. The Brilliant affidavit in no way resembles a verification. It does not affirm the truth of the allegations of the complaint, either on Mr. Brilliant's own knowledge or even on the basis of information and belief. In fact, the only reference to the allegations of the complaint is the concluding sentence of the affidavit:

"I told her [Mrs. Surowitz] that the charges in the complaint reflected the investigation and study of Mr. Rockler and myself and that, in my opinion, the charges of wrongdoing were soundly based." (R. 124).

In short, Mr. Brilliant, the instigator of this action, is unwilling to swear under oath that the charges made in his complaint are true, either of his own knowledge or on information and belief. While he permitted, indeed encouraged his mother-in-law to verify those charges, he confines his oath to the innocuous statement that he "told" *her* that they were soundly based. One can only conclude that petitioner's counsel were well-advised in the trial court and the Court of Appeals in *not* arguing that the Brilliant affidavit constituted a "verification" of the complaint.

2. Mr. Rockler's affidavit is equally defective, but for another reason. After affirming on knowledge and on information and belief the truth of the allegations of the complaint, he concludes the affidavit by the following reservation, which precludes the operation of the affidavit as a verification:

"This affidavit is made necessary by defendants' motion of February 26, 1964 and the proceedings in

court on that date; it is filed *solely* for the purpose of refuting incorrect and misleading implications therein. Counsel and the plaintiff do not in any respect agree to waive, and expressly reserve, the *attorney-client privilege and the confidential and privileged character of counsel's work products.*" (R. 143).

Mr. Rockler's carefully phrased escape clause in effect "rescinded" any possible verification that appeared in the earlier portion of the affidavit. This reservation effectively prevented any examination into the truth of Mr. Rockler's previously expressed belief in the soundness of the allegations of the complaint.

d) Even If the Rockler and Brilliant Affidavits Had Been Intended as or Could Constitute the Requisite Verification of the Complaint, Petitioner Has, at this Stage, Waived Any Right So To Contend.

On March 23, 1964, the motion to dismiss was argued orally before the trial court. During the course of argument, that court repeatedly suggested that additional parties plaintiff be added or that, in any event, a verification be made by some person other than Mrs. Surowitz. (R. 175-176, 178).

The Trial judge emphasized that the critical fact was the necessity that the verifier have sufficient knowledge and information to make a true verification, stating at one point:

"I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, induced her to sign it [the complaint] but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant [the

financial adviser] who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

"It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. *But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does.*" (R. 175-176).

Later, when petitioner's counsel made one of his frequent references to the policy of the Securities Acts, the Court stated:

"Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

"You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name. It seems to me that would have been the simple way to do the thing properly." (R. 185).

But petitioner's counsel made no effort whatever to respond to the trial court's suggestions that they tender a proper verification. There was no motion to amend the complaint or to file a substitute verification.

The only response by petitioner's counsel to the trial court's suggestions was a stubborn insistence that Mrs. Surowitz' verification was not false and was sufficient to satisfy Rule 23(b).

Although the Rockler and Brilliant affidavits were on file and were referred to repeatedly by counsel during argument, it was never stated or even intimated that either

affidavit constituted or could be considered to constitute a substitute verification.

Thereafter, on March 27, 1964 there was extended argument before the trial court on proposed findings of fact and conclusions of law in support of an order dismissing the complaint. One of the findings of fact states:

"34. Plaintiff's counsel have not asked for leave to file a substitute verification or an amended complaint." (R. 156)

Paragraph 5 of the trial court's conclusions of law states:

"5. The verification of this complaint is false and sham and the complaint must be stricken. Since the plaintiff has not sought leave to substitute any other verification or filed an amended complaint the action will be dismissed." (R. 157)

In all of his lengthy attack on the proposed findings of fact and conclusions of law, counsel for petitioner never argued that those quoted above (Finding 34 and Conclusion 5) were either inaccurate or incorrect.

If one or both of the Rockler-Brilliant affidavits had been intended to verify the complaint, it was the duty of counsel at that time to make this intention clear to the trial court.

On appeal, for the first time, petitioner rather timidly suggested in one paragraph of her brief that it would involve "no unwarranted stretching of Rule 23(b) to treat Mr. Rockler's affidavit as a verification of the complaint." (Petitioner's brief in Court of Appeals, p. 54). The Court of Appeals quite properly held that, since the petitioner had chosen to stand on the Surowitz verification instead of submitting another verification to the trial court, the ques-

tion of Rockler's capacity to verify or the sufficiency of his affidavit as a verification was not before the court.

In this Court petitioner contends for the first time that *both* the Rockler and Brilliant affidavits ought to be considered as verifications.

On the dismissal of a complaint by a District Court a plaintiff has an election to amend as of right under Rule 15(a) FRCP or to stand on his complaint. If he appeals, he has elected to stand on the complaint and has waived his right to amend. *Wallingford v. Zenith Radio Corporation*, 310 F.2d 693, 696 (7th Cir. 1962); *222 East Chestnut Street Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 514-515 (7th Cir. 1958) cert. denied 358 U.S. 907 (1958); see also *Duane v. Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962); *Asher v. Rupp*, 173 F.2d 10, 11 (7th Cir. 1949); *National Van Lines v. United States*, 326 F.2d 362, 366-367 (7th Cir. 1964). This rule is essential to the orderly administration of justice in the federal courts.

Petitioner's present theory of "substitute verifications" is an afterthought concocted by petitioner's counsel on appeal after they had deliberately confronted the district judge with the choice of accepting petitioner's false verification or dismissing of the action. Counsel now attempt to convince this Court that they should be able to shift their position on appeal and tender, as verifications, documents which were filed for completely different purposes.

4. The Decision of The Court of Appeals.

Throughout petitioner's brief there is a consistent effort to misrepresent the opinion of the Court of Appeals as one hostile to the Securities Acts, and to derivative actions generally. In fact, the opinion of the Court of Appeals reflects a clear understanding of the issues in this case, a

comprehension of the value and benefits to be derived from suits under the Securities Acts and derivative actions generally, and an understanding of the limited firsthand knowledge and sophistication of the many shareholder plaintiffs. The court concluded, after an extremely careful and fair analysis, that reversal in this case would not further these policies but rather that affirmance was required in order to avoid nullifying Rule 23(b) and condoning the filing of a false affidavit.

The nub of the opinion is the consideration and rejection of petitioner's general argument that the verification should be construed as truthful and sufficient because of Mrs. Surowitz' lack of education and "sophistication" and the related specific argument that the verification could not be considered false because two and one-half months had lapsed between the verification and the petitioner's deposition.* The court emphasized its intention of announcing a rule which would not deter or discourage shareholders acting in good faith. Thus the court stated:

"In most cases, the plaintiff in a shareholder's derivative suit is merely the instrument for bringing the suit to the court. By hypothesis, most such plaintiffs would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance. Most of them, also, would have to rely upon the opinions and advice of trained counselors for many of the principal allegations of such a complaint." (R. 234).

* This "time lapse" argument, incredible in the light of the complete lack of information or understanding evidenced by the deposition, has apparently been abandoned by petitioner in this Court.

The court went on to conclude:

"We think a sensible interpretation of the verification requirements of Rule 23(b), in the light of the realities of litigation of this nature, must relieve the plaintiff after two and one half months from the necessity of recalling technical factual information which she received from trusted advisors and upon which she acted pursuant to their advice." (R. 234-235).

Again the court stated:

"[W]e conceive that all but the most sophisticated investors must rely upon attorneys, or other advisors to supply a substantial part of the information upon which any such complaint rests. We think the rule would be satisfied by verification of intricate factual and conclusory allegations in reliance upon such advice and information." (R. 236).

On the other hand the court concluded that to give any effect to the verification requirement, the verifier must have some minimum information and understanding. The court stated in its interpretation of that minimum as follows:

"But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint." (R. 236).

The court held:

"Rule 23(b) is one of the few instances in which the federal rules require verification of pleadings. We think that that provision requires something more

than the mere formality of reckless swearing to the truth of the matters not known. The derivative suit is a unique vehicle of litigation. The holder of one share of stock who is disgruntled at some act of a corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel a plaintiff to begin such a suit with sufficient knowledge of fact and information to show by his verification that there is substantial basis to support the complaint which he makes." (R. 235-236).

The court concluded that there could be no question that the requirements of Rule 23(b) were not satisfied in this case. The plaintiff testified affirmatively to only four matters:

"That she was an owner of Hilton Hotels' stock, that the stock missed a dividend, that she thought her stock was not right and that she consulted Mr. Brilliant relative to the meaning of the written offer submitted to her for the purchase of a number of Hilton Hotel shares." (R. 234).

The court stated:

"In the same light, no one can successfully refute plaintiff's positive statement that she did not know who the individual defendants were, that she did not know of any wrongful acts which they had done, that she did not know of any facts upon which she had alleged that the individual defendants had caused the purchase offers to be made, that she knew nothing about any protest which she had made to the corporation, except for the fact that she had signed a letter shown to her, and that she did not understand the factual basis of her complaint." (R. 234).

The court further stated:

“[W]e find it inconceivable that the instigator of a suit of this nature could fail to know the identity of the individual defendants as directors and officers of the corporation and to know in a general sense what wrongful acts she conceived to have been done which formed the whole supporting skeleton for the suit which she has filed. We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

“We can only conclude, as did the court below, that plaintiff’s verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant.

* * *

“[I]t affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about. We must conclude that there was, in fact, no verification of this complaint.

“That conclusion cannot be altered by the fact that many of the material allegations of the complaint are obviously true and cannot be refuted. Nor can it be altered by the fact that plaintiff is a person having little education and, quite apparently, wholly lacking in sophistication and financial matters. Those limitations can’t apologize for her affirmative statements, for example, that she knew of no fact upon which she

alleged that the individual defendants had caused the stock purchase offers to be made, and that she did not know why she had alleged that those defendants had committed any of the unlawful acts alleged. These things she must have known to give legitimacy to the serious charges made against those individuals.

* * *

“We conclude that any lesser requirement would make the verification provision farcical.” (R. 235-239).

SUMMARY OF THE ARGUMENT.

It is respectfully suggested that this Court, the ultimate voice in American jurisprudence, will not lend that voice to approve the filing of a false affidavit by ignoring what petitioner did herein. Rather the voice of this Court should speak out to decri the misuse of the oath, to establish a most meticulous standard of conduct for all who seek protection of the Federal Courts.

The verification of the complaint by petitioner was false. She knew nothing of her law suit, she did not understand even the barest outline of what she charged, yet she swore that she either knew those charges were true, or that she was informed of them and she believed them to be true. Such false swearing, without more, would justify the dismissal of any action.

In the instant case, however, petitioner's cause of action was derivative. She sued not in her own behalf, but in behalf of all shareholders of Hilton Hotels Corporation. In so purporting to act for all, she was required by Rule 23(b) to provide assurances as to her suit that are not required of other plaintiffs. These assurances include the verification of the complaint, which means just what it says—the verification of the complaint. Neither Rule 23(b) nor its application to this case is arbitrary or discriminatory.

There are good reasons for the requirements of Rule 23(b). A plaintiff, before taking control from the elected directors and, on behalf of all shareholders, putting the corporation to the expense and dislocation of a long lawsuit, must swear by himself or by a responsible fiduciary of the plaintiff that the allegations of the complaint are true, or are believed to be true. Of course the plaintiff may rely upon the advice of trusted counselors. A fiduciary may sue on behalf of a shareholder so lacking in understanding as to be unable to comprehend the nature of the action. But, in any case, a truthful verification must be provided.

This was not done in the instant case. Here the instigator of this litigation refused to verify the complaint. He caused it to be filed in the name of the petitioner, a puppet plaintiff, and procured the false verification of the complaint by that plaintiff. This is a serious matter. The issue cannot be avoided by irrelevant and specious arguments concerning the differences between "knowledge" and "belief", nor by reliance upon the signature of counsel under Rule 11. The filing of false affidavits in the Federal Courts is a practice which deserves the severest condemnation.

Petitioner's counsel concede that this is a derivative action and that some kind of verification was required by the Rule. They argue, however, that the Rule's requirement that "the complaint shall be verified by oath" should be "interpreted" to mean that verification of a few allegations, concerning standing to sue, will suffice.

This "interpretation" is flatly contrary to the unambiguous language of the Rule as it has existed since 1882. It is not supported by the history of the Rule or by the cases which have interpreted it. The argument is based upon an assumption that the only purpose of Rule 23(b) is the prevention of collusive suits between corporate management and "friendly" shareholders.

The language of the Rule and the decisions of this Court and lower Federal Courts demonstrate that the Rule has a number of other purposes; including the prevention of speculation in litigation and the assurance, by a responsible statement under oath, that there is good cause for the charges made in the complaint and a real necessity that the cause of action be prosecuted by a shareholder rather than by the corporation itself. No assurance of any kind is given by a false and groundless verification.

The record in this case demonstrates that the trial judge repeatedly suggested that the defects revealed by plaintiff's deposition be corrected by adding additional party plaintiffs or by substituting a proper verification. Petitioner and her counsel insisted upon standing on petitioner's false verification, thereby confronting the trial judge with the choice of dismissing the action or approving the nullification of the Federal Rules. Dismissal under these circumstances was wholly appropriate.

ARGUMENT.

I.

PETITIONER'S VERIFICATION WAS A DELIBERATELY FALSE PLEADING AND A FRAUD UPON THE FEDERAL COURTS. AS SUCH, IT REQUIRES THE DISMISSAL OF THIS ACTION.

Petitioner's argument never faces up to the fact of the false character of her affidavit of verification and the consequences of that falsehood. The verification was not merely false in some technical or theoretical aspect. It was wholly and completely false. It was false because petitioner swore that she was familiar with the allegations of the complaint when in fact she was totally unfamiliar with the allegations and with the subject matter of the complaint.

It was false because she swore that certain allegations were true as of her own knowledge when she had no knowledge concerning those allegations and did not even understand them. The verification was false because petitioner swore that she made every other allegation on information and belief when in fact she had no information upon which to base a belief as to the truth of any allegation. She did not understand any of the allegations nor did she have any idea what the law suit was all about. She is a puppet. Nothing more.

The deliberate filing of the false affidavit is a fraud upon the Court, even if it could be assumed that the affidavit was unnecessary or that the scope of the affidavit was unnecessarily broad. This Court upheld a perjury conviction even though the perjury had occurred in a trial based upon an indictment which was later determined to be defective. *United States v. Williams*, 341 U.S. 58 (1951). The Court stated at page 68:

"Here, however, we have a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury. We have a court empowered to take cognizance of the crime of perjury and decide the issues under that statute. The effect of the alleged false testimony could not result in a miscarriage of justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony. That statute has led federal courts to uphold charges of perjury despite arguments that the federal court at the trial affected by the perjury could not enter a valid judgment due to lack of diversity jurisdiction, or due to the unconstitutionality of the statute out of which the perjury proceedings arose."

Accord: *Kay v. United States*, 303 U.S. 1, 6-7 (1938).

In other cases this Court has referred to perjury as a "pollution" of the judicial process. *Mesarosh v. United States*, 352 U.S. 1, 14 (1956). Cf. *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956).

Petitioner's counsel seek to avoid the inevitable conclusion of falsehood on three grounds. First, they contend that none of the allegations of the *complaint* have been shown to be false and that many are correct. Secondly, they rely upon extensive investigations allegedly made by Mr. Brilliant, and by petitioner's counsel, prior to filing the complaint. Third, they argue that the verification was not false because petitioner relied upon general assurances by Mr. Brilliant and her counsel that the allegations were well-grounded. These arguments seriously misapprehend the ground upon which the complaint was dismissed and the second ground confuses the requirement of Rule 23(b) with the requirement of Rule 11.

A. Petitioner's Affidavit Was False Because She Was Completely Ignorant of the Truth or Falsity of the Allegations of the Complaint.

Plaintiff's argument concerning the truth of the allegations of the *complaint* ignores the fact that it is plaintiff's *verification* and not the *complaint* which is alleged to have been false. Petitioner's deposition establishes conclusively that her *affidavit* of verification was false regardless of the truth or falsity of particular facts alleged in the *complaint* itself.

For a very long time the law has recognized that it is false to swear or represent that a person knows or believes something to be true when in fact he has no knowledge or belief on the subject.

The decision in *In Re Frank*, 234 Fed. 665 (E.D. Pa. 1916) *affm'd* 239 Fed. 709 (3d Cir. 1917) involved a situation very similar to the one in the case at bar. The court described the situation as follows, at 234 Fed. 666:

“At the trial upon the issue of the bankruptcy of Charles Frank, the three subscribers to the creditor’s petition were called, and from their sworn testimony it appeared that, at the time they respectively signed the petition, they had no knowledge of any of the acts of bankruptcy alleged therein, and that they did not make oath to the petition before the notary public who attached his jurat thereto. Upon this state of facts, the petition was dismissed because it did not meet the requirements of Section 18(c) of the Bankruptcy Act providing that: ‘All pleadings setting up matters of fact shall be verified under oath.’ ”

The creditors then attempted to amend their petition with a proper verification and to present depositions showing knowledge of the alleged acts of bankruptcy. The Court refused to allow the amendment, stating at page 666:

“Insofar as the facts now sworn to are contradictory to those deliberately, freely and voluntarily testified to under oath by the deponents in court, their depositions cannot be considered. . . .”

In the law of deceit one may make an intentional false representation either if he knows the representation is false or if he makes the representation recklessly in ignorance of its truth or falsity.

“[T]he jury were properly instructed, that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule.” *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884).

"Statements not known to be true by the person making them are in law false." *United States v. Bradford*, 148 Fed. 413, 424 (E.D. La. 1905), *aff'd* 152 Fed. 616 (5th Cir. 1907).

Yates v. Boteler, 163 F.2d 953, 959 (9th Cir. 1947); *Third Nat. Bank v. Schatten*, 81 F.2d 538, 540 (6th Cir. 1936); *Union Pac. Ry. Co. v. Barnes*, 64 Fed. 80, 83 (8th Cir. 1894); *Tone v. Halsey, Stuart & Co., Inc.*, 286 Ill. App. 169, 180, 3 N.E. 2d 142 (First Dist. 1936); *Brennan v. Perselli*, 353 Ill. 630, 635, 187 N.E. 820 (1933).

B. Investigations by Petitioner's Counsel May Have Satisfied Rule 11, But Such Investigations Have No Bearing on the Truth of Petitioner's Verification.

Throughout petitioner's brief it is constantly suggested that the investigations allegedly made by Messrs. Brilliant and Rockler should somehow preclude the dismissal of the complaint. Insofar as the investigations themselves are relied upon, this argument reflects a confusion between the requirements of Rule 11 and Rule 23(b).

The affidavits of Rockler and Brilliant concerning their investigations might well be relevant to a motion to dismiss the complaint as sham under Rule 11, or a motion to challenge the propriety of the attorneys' signature to the complaint under that Rule. But the Federal Rules require that complaints in derivative suits be verified and *also* be signed by counsel. The argument justifying counsel's signature under Rule 11 wholly fails to consider the verification requirement of Rule 23(b).

As the Court of Appeals stated:

"Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a mere semantic

exercise in the drafting of its provisions. Had they intended the certification provision of Rule 11 to supersede the verification provision of Rule 23(b), we think that the latter provision would have been omitted. We think the intent was to impose a condition of added assurance in the narrow field to which 23(b) applies." (R. 236).

C. Petitioner's Blind Faith in Brilliant's General Assurances Do Not Constitute a Basis for Allegations on Information and Belief.

Apart from the arguments based on Rule 11, petitioner's counsel argue that Mrs. Surowitz' verification was proper because she relied upon general assurances of Mr. Brilliant that he and Rockler had investigated the allegations of the complaint (none of which she understood) and considered them to be well grounded. This argument is untenable.

It flies in the face of the very language of the verification form chosen by petitioner's counsel—a form of verification substantially identical to that commonly used in both Federal and State courts. The verification states that the plaintiff is familiar with the allegations of the complaint, that she knows some of them to be true and correct, and that she makes each of the others on information and belief and believes them to be true.

It is impossible to stretch the English language so far as to say that such a verification accurately or reasonably describes a factual situation in which the plaintiff is totally unfamiliar with the subject matter or accusatory allegations of the complaint and in which she has no knowledge or information sufficient to form a belief as to any of the accusatory allegations but makes them in blind faith upon the general assurances of another person.

Failure to disclose this factual situation is contrary to the purpose of the verification requirement of Rule 23(b) and is a fraud upon the court.

All of the authorities cited on pages 35-36 of petitioner's brief stand for the concededly sound proposition that firsthand *knowledge* differs from "information and belief," and that a complaint may be verified in part on the basis of information and belief. But these cases are irrelevant here. No one denies the right of Mrs. Surowitz to verify properly on information and belief. In fact, the Court of Appeals expressly stated that, in shareholder derivative actions, most plaintiffs would naturally rely upon information received from their advisors or attorneys.

It is elementary that the difference between allegations upon knowledge and allegations upon information and belief is the difference between first-hand knowledge and a conviction based upon some kind of hearsay. In each of the cases cited in petitioner's brief, it had been contended that a verification was improper because the verifier could not testify to the facts alleged on the basis of his own first-hand knowledge. For example, he might have alleged, on information and belief, that a stock transaction took place or that corporate directors were engaged in certain secret and improper dealings. The basis of these allegations might be newspaper accounts, reports filed by the corporation or hearsay information furnished by the verifier's advisors or attorneys. In each case, the court held that the verification upon personal knowledge was not required, and that verification upon hearsay information was sufficient. All of these holdings are concededly sound. None have any relation to the issues in this case.

Petitioner's deposition reveals that she had never acquired or assimilated the most elementary information or understanding concerning the parties to this litigation or

the securities transactions or charges contained in the complaint, yet she swore that she was familiar with them, and that she believed them to be true because she had been informed about them. Without such information and understanding she could not truthfully make these allegations upon information and belief.

Petitioner asserts on page 35 that a verification on information and belief was not intended to import "personal knowledge and understanding." The assertion, as we have seen, is obviously true with respect to personal knowledge. But contrary to the statement in petitioner's brief, not one of the authorities there cited stands for the proposition that verification may be made "on information and belief" without any "understanding". In fact, elimination of the requirement of some understanding would render such a verification a mere form of words.

Dismissal of petitioner's complaint was required in this case, but *not* solely because she lacked knowledge of the wrongs alleged. Dismissal was required because she had filed a false affidavit, claiming to have knowledge or belief when she had neither, claiming to have familiarity when she had none.

What a mockery it is for petitioner to argue (Pet. Br. p. 20) that:

"The Securities Acts and derivative suits as instruments for preventing corporate misconduct are especially important in light of the increasing number of uninformed, small stockholders, particularly women. The role such stockholders can play in checking abuses is of major significance . . ."

“Uninformed, small”, female “stockholders” indeed. This was the action of a graduate lawyer, an M.A. in economics, an investment counselor of ten years experience, a holder of more than 2,000 shares of Hilton stock. The fraud was his, the dismissal for that fraud alone is justified.

II.

RULE 23(b) REQUIRES THAT THE ENTIRE COMPLAINT BE VERIFIED. PETITIONER'S FALSE AFFIDAVIT IS A FRAUD AND A NULLITY. AS SUCH IT DOES NOT SATISFY THE RULE.

A. Petitioner Concedes That Rule 23(b) Applies to This Case and That A Verification Was Required.

It is not necessary to go beyond the affidavit appended to the complaint. It clearly shows that the petitioner and her counsel construed Rule 23(b) at the time the complaint was filed in accordance with its plain language to require a verification of each allegation of the eleven counts of the complaint.

Before this Court petitioner has conceded that her action is entirely “a derivative suit” (Pet. Br. p. 2). Thus the exhaustive analysis of the Court of Appeals of each of the counts of the complaint, and the conclusion based upon that analysis that, in the circumstances alleged in the complaint, the appropriate federal statute created a cause of action only in the corporation itself, is fully justified.

In this regard the instant case is quite different from that considered by this Honorable Court in *J. I. Case Company v. Borak*, 377 U.S. 426 (1964). In *Borak*, the shareholder plaintiff complained of misleading statements

in the proxy materials with resulting injury to the plaintiff's pre-emptive right as a shareholder. The cause of action sued on could be considered either derivative or direct. In contrast, each of the claims set forth in the complaint in the instant case is solely and squarely derivative. No personal loss is claimed by petitioner. The loss, if any, is alleged to have been suffered by Hilton Hotels Corporation.*

* Petitioner did not participate in the transactions complained of either as a seller or as a purchaser.

Under these circumstances the Federal Securities Act of 1933 and the Securities Exchange Act of 1934 permit suits only by sellers or purchasers. Counts IV and X of the Complaint are based on § 12 of the Securities Act of 1933, 15 U.S.C. § 77(1) which provides that certain sellers of securities who violate the Act "shall be liable to the person purchasing such security from him." Only the purchaser has a cause of action, *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799 (3rd Cir. 1949), cf. *MacClain v. Bules*, 275 F.2d 431 (8th Cir. 1960).

Counts III and IX of the Complaint are based on § 9 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(i) which provides that certain violators "shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction."

Counts I and VII are based on § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) which does not expressly provide for actions for damages for violations of the Section. The federal courts have held that such civil liability exists. However, where, as in this case, the corporation was the party allegedly injured by the violation, the courts have held that the only cause of action is that of the corporation. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952) cert. denied 343 U.S. 956 (1952); *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799, 805-806 (3rd Cir. 1949); *Kremer v. Selheimer*, 215 F. Supp. 549, 552 (E.D. Pa. 1963).

Counts II and VIII are based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(q). This Section, like Section 10(b), does not specifically provide for civil liability. However, the language of

The only reference to "the federal question" argument is found in footnote 11 at pp. 27 and 28 of petitioner's brief. The footnote states that the petitioner "need not go so far as to urge the point here." Petitioner's brief therefore concedes, as indeed it must, that since this is solely a derivative action, Rule 23(b) applies and requires a verification.

B. The Unambiguous Language of Rule 23(b) Clearly Requires Verification of the Entire Complaint.

Rule 23(b) is entirely clear and unambiguous. It requires verification of the entire complaint, not merely a few preliminary allegations. The Rule provides in pertinent part:

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, *the complaint shall be verified by oath . . .*"

In fact, petitioner merely concedes the obvious when she states:

"The grammar of the Rule—both as originally written and as it now is embodied in Rule 23(b)—indicates that the entire complaint in a derivative suit is to be verified." Pet. Br. 30.

the Section and particularly the condemnation of devices which operate as a "fraud or deceit upon the purchaser" indicates that it, like the other sections, would give a cause of action only to the purchaser—the corporation. This conclusion is supported by the existing authorities, *Newman v. Baldwin*, 179 N.Y.S. 2d 19, 23 (Spec. term 1958); See *Birnbaum v. Newport Steel Corp.* 193 F.2d 461, 463 (2nd Cir. 1952).

When the language of a statute or rule is clear and unambiguous and permits only one reasonable construction, that statute or rule must be enforced according to its terms.

Rules promulgated by this Court may be changed only through the rule-making process. It is in that process that policy arguments such as those relied upon by petitioner may be considered and weighed.

As this Court stated in rejecting a proposed emasculation (on alleged grounds of public policy) of Rule 45(b) of the Federal Rules of Criminal Procedure:

“Rule 45(b) says in plain words that ‘... the Court may not enlarge ... the period for taking an appeal.’ ... the plain words, the judicial interpretations, and the history, of Rule 45(b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand.

That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. . . .” *United States v. Robinson*, 361 U.S. 220, 229 (1960).

See also *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 322-324 (1959); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964); *Miner v. Atlass*, 363 U.S. 641 (1960). As to statutes, see also *Jay v. Boyd*, 351 U.S. 345, 357 (1956); *United States v. Rice*, 327 U.S. 742, 752-753 (1946); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965); *United States v. Sullivan*, 332 U.S. 689, 693 (1948).

Rule 23(b) was first adopted as Equity Rule 94 in 1882. From its adoption until the revision of the equity rules promulgated by this Court on November 4, 1912, the Rule provided in pertinent part:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain . . . (the specific allegations now referred to in Rule 23(b))." 104 U.S. ix, x, January 23, 1882.

In 1912, old Equity Rule 94 became Equity Rule 27. The language of Rule 94 was preserved intact in the new Rule, which remained unaltered until the adoption of the Federal Rules of Civil Procedure.

At the time of the adoption of the Federal Rules, the draftsmen followed a deliberate policy of making the verification an "exception and not the rule." 2 Moore's Federal Practice, Par. 11.03, p. 2105 (2d Ed. 1963). In most categories of civil cases, the attorney's signature to the complaint sufficed and no verification was required. The requirement of verification was retained in only a few situations. One of these was the shareholder's derivative action.

In 1948 the Federal Rules of Civil Procedure were revised. At that time the requirement of verification was eliminated in several types of actions*, but was retained

* *e.g.* Interpleader 28 U.S.C. 1335 (formerly 28 U.S.C. 41(26)), Plea of Non Est Factum, 28 U.S.C. 1733 (formerly 28 U.S.C. 665), Petitions filed against the United States 28 U.S.C. 1402 (formerly 28 U.S.C. 762). See generally 2 Moore's Federal Practice, Par. 11.03 (2d Ed. 1963).

in Rule 23(b). This could hardly have been inadvertent since the revisors carefully considered whether the requirements of Rule 23(b) were substantive or procedural. Again, in 1963, the Rules were revised, but again the verification requirement of Rule 23(b) was retained, with its original language unchanged.

Whenever This Court Has Had Occasion To Refer To The Verification Requirement, It Has Described The Requirement As The Verification Of The Entire Complaint.

Equity Rule 94 was adopted as a result of the decision of this Court in *Hawes v. Oakland*, 104 U.S. 450 (1882) in which, at p. 461, this Court stated in substance the requirements which were later embodied in the Rule. The Court stated that certain specified allegations "should be in the bill [Complaint in Equity], which should be verified by affidavit." The language refers to verification of "the bill", not merely allegations relating to standing to sue.

In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 556 (1949), this Court described Rule 23 as requiring "the stockholder's complaint to be verified by oath."

Despite the "concession" that Rule 23(b) by its plain language requires the plaintiff to verify the entire complaint, petitioner's brief relies completely on the argument that, at most, Rule 23(b) requires verification of only three of the allegations in the entire complaint: (1) the allegation asserting plaintiff's ownership of stock at the time of the alleged wrongdoing; (2) the allegation denying that the action is collusive, and (3) the allegation setting forth the plaintiff's attempts to have the corporation enforce its own cause of action. This construction is not supported by any authority and is contrary to the language, history and purpose of Rule 23(b).

C. Neither the Language Nor the Purpose of Rule 23(b) Is Limited to Requiring the Verification of Allegations Relating to Standing to Sue Only. It is a Rule Intended To Assure That Shareholder Derivative Suits Are Well-Founded and Brought for Good Cause.

An examination of the language and content of Rule 23(b) demonstrates that its purpose is not limited to the prevention of collusive suits.

Rule 23(b) contains four pleading requirements. The first is the verification requirement which is at issue in this case. Second, the Rule requires an allegation that the action is not a collusive suit. Obviously, this allegation is intended to prevent abuse of diversity jurisdiction. Third, the Rule requires specific allegations describing the efforts of the plaintiff to secure prosecution of the corporate cause of action by the corporation and the reasons for failure to secure corporate action. This requirement has no apparent connection with the prevention of collusive suits. It is intended to satisfy the requirement that the corporation be given every opportunity to prosecute its own cause of action before the shareholder is permitted to utilize the extraordinary remedy of a derivative action.

The fourth requirement of Rule 23(b) is an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains or that his shares thereafter devolved on him by operation of law. Plaintiff's counsel argue that this "contemporaneous ownership" requirement was intended to prevent the apparent creation of diversity of citizenship jurisdiction in collusive actions by the purchase of shares by a person of the requisite citizenship just before the filing of the action. It is clear that an equally important purpose of this provision was to preclude the "purchase of a lawsuit" after the alleged wrong by a person who desired to speculate in litigation.

1. Rule 23(b) Is Intended To Prevent "Unfriendly", as Well as Collusive, Derivative Actions When the Requirements of the Rule Are Not Fulfilled.

Multiple purposes for Rule 23(b) were first indicated in the decision of this Court in *Hawes v. Oakland*, 104 U.S. 450 (1882) *supra*. There, the Court affirmed the dismissal of the shareholder's derivative action which complained that the corporation improperly allowed a municipality free use of the corporation's water. In that case, this Court enunciated the requirements which have since been codified in Rule 23(b) and its predecessor equity rules. As petitioner points out (Pet. Br. p. 25) this Court did discuss the necessity of preventing collusive actions between "friendly" shareholders and corporate management. The opinion, however, went on to catalogue types of grievances which could be made the subject of derivative actions by "unfriendly" shareholders, and to confirm the necessity of bona fide efforts by a would-be shareholder plaintiff to obtain corporate enforcement of the cause of action prior to the institution by such shareholder-plaintiff of a derivative suit. The Court stated at pp. 460-462:

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit— [This Court here listed a large number of specific wrongs, which if committed by directors, would justify the institution and prosecution of a derivative action by the shareholder.]

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes.

* * *

The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of the opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity—no right in himself to prosecute this suit.”

This language makes clear that the Court intended the requirements of Equity Rule 94 to apply to and to regulate “unfriendly” as well as “friendly” derivative actions and that the provisions of the Rule have purposes distinct from and in addition to the prevention of collusive suits.

The fact that old Equity Rule 94 was not intended solely to prevent collusive actions is further conclusively demonstrated by the opinion of this Court in *Dimpfell v. Ohio and Mississippi R. Co.*, 110 U.S. 209 (1884), a decision rendered

by the same Court (with one exception) which had adopted Rule 94. This case was a real contest between the shareholder and the corporate management. Consequently, there would have been no reason to affirm the dismissal of the action if prevention of collusive suits were the only purpose to be served by the Rule. Nevertheless, the dismissal was affirmed, squarely on the basis of lack of compliance with Equity Rule 94. The Court's decision was based upon the fact that the complaint did not satisfy two requirements of that Rule *i.e.* it did not allege that the plaintiff was a shareholder at the time of the alleged wrongdoing and it did not properly show attempts to secure action by the corporation itself. The Court stated at p. 210:

"And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterward expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive."

Obviously, concern with abuses of "unfriendly" shareholders actions was one of the considerations which impelled the court which promulgated Rule 94.

A much more recent decision bearing on this question is *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). There application of the security-for-costs statute of the forum state was upheld in a stockholder's derivative action. In the portion of the opinion which considered the constitutionality of state security-for-costs legislation, the Court

discussed the nature of stockholder derivative actions and the purpose and effect of Rule 23, first pointing to the historical need for stockholder derivative actions and the abuses which were sometimes attendant upon their prosecution. The Court said, in justifying state regulation of such cases (337 U.S. at 549) :

“The very nature of the stockholder’s derivative action makes it one in the regulation of which the legislature of a state has wide powers.”

The Court went on to describe a plaintiff such as petitioner here as follows (337 U.S. at 549-550) :

“Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing *standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. . . .*”

The Court commented in this connection upon Rule 23(b) stating (337 U.S. at 550, 556):

"It is not without significance that this Court has found it necessary long ago in the Equity Rules* and now in the Federal Rules of Civil Procedure** to impose *procedural regulations of the class action not applicable to any other.*

* * *

"Rule 23 requires the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations. It also requires a showing that an action is not a collusive one to confer jurisdiction and to set forth the facts showing that the plaintiff has endeavored to obtain his remedy through the corporation itself."

In *Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.*, 213 U.S. 435 (1909) relied upon by petitioner, (Pet. Br. 26) the Court actually made it clear that the purpose of Rule 94 relates not only to jurisdiction but *also to the preservation of the control of a corporation over its own affairs and to the restriction of shareholder suits to cases of real necessity.* The Court stated at pp. 446-447:

"The purpose of Rule 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction *and recognizes the right of*

* Old Equity Rule 94, 104 U.S. ix; Equity Rule 27, 226 U.S. 649, 656.

** Rule 23(b).

the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right."

The existence of a number of purposes for Rule 23(b) and its predecessors is also demonstrated by the discussion in 3 Moore's Federal Practice, § 23.15 through 23.19 (2d Ed. 1963).

Lower Federal Courts, in applying Rule 23(b) to derivative actions, have emphasized that it does not establish jurisdictional requirements solely, but performs a salutary function in protecting corporations against the dissipation of assets. *Gottesman v. General Motors Corporation*, 28 F.R.D. 325 (S.D. N.Y. 1961); *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F. 2d 257, 265 (9th Cir. 1964) cert. denied 380 U.S. 956 (1965); *Bauer v. Servel, Inc.*, 168 F. Supp. 478, 481 (S.D. N.Y. 1958); See also opinion by Roscoe Pound, Comm., in *Home Fire Insurance Co. v. Barber*, 67 Neb. 644, 93 N.W. 1024, 1029 (1903).

2. There Are Compelling Reasons For The Requirement Of Rule 23(b) That The Entire Complaint, Accusatory As Well As Jurisdictional Allegations, Be Verified.

In a case such as that presently before the Court, an understanding plaintiff could have verified the period of his stock ownership, the lack of collusion, and the unavailing demand for action by the directors. Why require more?

Because the failure of the directors to act may have been the result, as would be proved here, of a total lack of justification for the charges of corporate wrongdoing on which the directors were asked, and refused, to act. It is a proper requirement of the law, embodied in Rule 23(b), that the plaintiff who complains of a lack of corporate response by its elected directorate to such charges of wrongdoing make those charges only upon oath.

There are compelling reasons for this requirement. These reasons apply whether the plaintiff swears to the truth of the allegations as of his own knowledge, or that they are believed to be true based upon information on which the plaintiff relied.

The derivative action is unique in that it removes control of corporate activity from the elected corporate officers and directors, and places it in the hands of a volunteer. In the proper case this is the most salutary of results, for in this manner corporate malefactors can be called to account for their wrongs to the corporation.

It is equally true, however, that the serious charges which justify the transfer of control must be made only for a proper purpose. The critical allegations are not jurisdictional allegations, the four "allegations upon which * * * standing to sue rests" (Pet. Br. pp. 31-34). Allegations of wrongdoing must be made if the complaint is to withstand summary dismissal. These allegations *are* serious, for from them arises the necessity that the corporation and its directors defend a long and expensive lawsuit, or engage in equally long and expensive discovery procedures.

If the affiant has no knowledge, but must allege a belief obtained from information furnished by another, that "other" may be called to account for the charges made. Only by requiring that these allegations be verified by the person making them can adequate assurances be obtained that the person who has made a record of his claims is willing to make oath as to the accuracy of those claims. If that oath is false, as here, the purposes of Rule 23(b) are not accomplished.

It is not unreasonable, therefore, to suggest that, because of their nature, stockholder's derivative actions *should* require knowledge on the part of the plaintiff of the general nature of the action, even though the verification may be by the plaintiff's fiduciary who has access to more specific facts, or who can indicate to the defendants the source of the agent's information and belief that a wrong was done to the corporation. The derivative suit is a long, expensive procedure. True it is that the facts are particularly in the possession of the corporation and its allegedly faithless management. But all shareholders have an interest in the preservation of corporate assets, either through the preventing of waste in defending frivolous lawsuits, or in the collection of assets wrongfully diverted by the management.

That there is a serious reason for balancing the interests of the shareholder-plaintiff against the interests of the other shareholders and the corporation is stated in Douglas; *DIRECTORS WHO DO NOT DIRECT*, 47 Harvard Law Review; 1305, 1327 (1934):

"In the first place, there is the small and isolated investor who needs adequate opportunity for protection against the managers or the board. In the second place, there are the managers and the board who need effective protection against the blackmailer or striker, lest the risks attendant to those business positions prove to be too onerous. Making it easier for the legitimate plaintiff and harder for the illegitimate is a

problem which will never be wholly solved, but some progress can be made. In one form or other it means granting to trial courts greater discretion."

One District Court responded to this concept by imposing costs upon the plaintiff after the dismissal of a stockholder's suit in which:

"The plaintiff testified that he had never read the complaint, did not know what it contained, and was unaware of the charges made over his name in the complaint against the defendant corporation; that he had not contributed to the expenses of the litigation; that he did not know any of the information that was contained in the complaint, nor did he give such information to the plaintiff's attorney, nor did he know in what manner his counsel obtained the information for the purposes of preparing the complaint.

"Apparently the plaintiff gave the use of his name to others for the purpose of instituting this action. This action was brought without any basis, and was vexatious and oppressive. It was brought solely for the purpose of annoying and harassing the defendant corporation and its business."

Gazan v. Vadsco Sales Corporation, 6 F. Supp. 568 (E.D.N.Y. 1934).

This Court has always recognized the value of shareholder's derivative actions redressing breaches of duty by management. It is equally clear that this Court has recognized that "unfriendly" derivative actions, as well as "friendly" derivative actions, have potentialities for abuse greater than those present in ordinary civil litigation. Reasonable regulation of the "unfriendly" derivative action is

justified in order to prevent such abuse, and to preserve in proper cases the benefits of the derivative action.*

D. Petitioner's Authorities and Reasons Do Not Support Her "Interpretation" of Rule 23(b).

Petitioner has not cited a single case or even a single commentator interpreting Rule 23 or its predecessor rules to require verification *only* of certain allegations of the complaint.**

1. Petitioner's Own Authorities Point Up the Difference Between true "Interpretation" and the Emasculation of Rule 23(b) Sought by Petitioner.

The authorities cited by petitioner in support of the proposition that Rule 23(b) should be construed "liberally" actually illustrate the difference between genuine construction and the emasculation of the Rule sought by petitioner.

* It is significant that 36 states, including states in which the vast bulk of shareholder derivative actions are litigated, have imposed, by statute or rule of court, regulations upon the maintenance of such actions not imposed with respect to other civil litigation. The chart which is attached as an appendix to this brief depicts the regulations in effect in each state. Thirteen states require that complaints in derivative actions be verified under oath.

** Petitioner cites no case which holds that the prevention of collusive actions is the *sole purpose* of Rule 23(b). As we have noted, some of the cases relied upon by petitioner for her "interpretation," actually support the contrary conclusion that the Rule serves a number of additional purposes. Some of petitioner's authorities, such as *Huntington v. Palmer*, 104 U.S. 482 (1882); *Doctor v. Harrington*, 196 U.S. 579 (1905); and *Groel v. United Electric Co.*, 132 Fed. 252 (C.C.D.N.J. 1904), involved factual situations concerned *solely* with collusive actions or the existence of diversity jurisdiction. Consequently the opinions in these cases discuss primarily the "collusive suits" portion of the Rule. But none of these authorities assert that the Rule serves this purpose and no other.

For example, Rule 23(b) is silent as to whether verification shall be on personal knowledge or upon information and belief. In *Palmer v. Morris*, 316 F.2d 649 (5th Cir. 1963) and *Murchison v. Kirby*, 27 F.R.D. 14 (S.D. N.Y. 1961) the courts held that Rule 23(b) was satisfied by a proper verification on information and belief. Most courts permit either type of verification, and consequently the holdings of both these cases were reasonable constructions of the Rule.

In *Hoover v. Allen*, 180 F. Supp. 263 (S.D. N.Y. 1960) the Court held that, in a multi-plaintiff derivative action, a verification by *one* plaintiff was sufficient. Since Rule 23(b) merely requires that "the complaint shall be verified by oath", the conclusion that multiple verifications were not required was clearly a permissible *construction*.

Similarly, the Rule is silent as to the person or persons who may verify. In *Bosc v. 39 Broadway, Inc.*, 80 F. Supp. 825 (S.D. N.Y. 1948) the Court *construed* Rule 23(b) to permit verification by the plaintiff's attorney.

None of these cases changed the meaning of the Rule, nor reduced its effectiveness in carrying out the purposes for which it was adopted. In contrast to these cases of *construction*, petitioner here seeks no construction of the Rule but emasculation of the words "the complaint shall be verified by oath" so that they mean not what they say, but that only some of the allegations of the complaint need be verified at all, and that, as to these few, a false verification will suffice.

2. The "Fading Away" of the Alleged "Conflict" of the Decision of the Court of Appeals with Decisions of this Court and Decisions in the Second Circuit.

In the petition for certiorari, petitioner laid great stress upon an alleged conflict between the decision of the Court of Appeals in this case on the one hand, and the decision

of this Court in *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947) and the decision of a district court in *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961) on the other. This alleged important "conflict" has virtually disappeared from petitioner's brief on the merits. In fact, of course, no conflict ever existed and the citation of these cases by petitioner merely reflects the desperation of her position.

Koster v. Lumbermen's Casualty Co. upheld the dismissal of the shareholder's derivative action on the ground of *forum non conveniens*. The portion of the opinion quoted at pages 29-30 of petitioner's brief concerned the unimportance of the shareholder-plaintiff's role in the trial of the action, particularly as a witness. The language quoted refers to the fact, which we have already emphasized, that the shareholder-plaintiff may have no *first hand knowledge* of the facts of the law suit, therefore may not be a competent witness, and may "make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation." 330 U.S. 518, 525. This consideration was important in dealing with the question of whether a motion to dismiss a derivative action on the ground of *forum non conveniens* could be defeated merely by showing that the action was pending in the district in which the shareholder plaintiff resided. It has no relevance to the issue in this case, dismissed by reason of a false verification, for the *Koster* case has nothing to do with verification. It does not imply, much less hold, that the verification requirement may be dispensed with. To the contrary, this Court specifically stated that a shareholder may sue on behalf of other shareholders "only if the conditions laid down by Rule 23 . . . are complied with . . ." 330 U.S. at 523-524. The requirement that the verification be true,

and be by an affiant with understanding of the gravity of the charges made against corporate directors, is not eliminated.

Petitioner's reliance upon the district court's decision in *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961) merely illustrates petitioner's determination to try this appeal on the false issue of the propriety of a verification on information and belief as distinguished from one made upon personal knowledge. *Murchison v. Kirby* involved an attack upon a shareholder plaintiff for lack of *first-hand knowledge* of the allegations of the complaint. Plaintiff Murchison testified, as quoted in the petition (27 F.R.D. at 19 n. 10):

"My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this thing. . . . I wasn't there . . . so my information is general."

The opinion in that case upheld the propriety of Murchison's reliance upon information furnished to him by his lawyers and other advisers, and rejected a contention that the suit should be dismissed as sham *under Rule 11*.

Again, this decision has no significance in this case. The Court of Appeals in its decision in the case at bar repeatedly emphasized that plaintiff-verifiers may rely upon information given to them by attorneys and other advisers. The report of that case shows affirmatively that Mr. Murchison had received extensive information and reports from his attorneys. He was able to communicate such information in the course of his 1800 page deposition! A reading of the *Murchison* opinion compels the conclusion that Mr. Murchison readily satisfied the test stated by the Court of Appeals in this case. There is nothing in the

opinion which suggests that his state of mind was anything like that of Mrs. Surowitz, or *that he had sworn to a false affidavit.*

E. No Issue Relating to The Securities Act Is Presented Upon this Appeal.

The petitioner's brief attempts to suggest to this Court that the effective enforcement of the Securities Act of 1933 and the Securities Exchange Act of 1934 depend upon the outcome of this appeal. This is a sham issue. No question is presented with respect to the interpretation of the Securities Acts or the enlargement or diminution of causes of action created by those statutes.

The only question at issue is the integrity and enforcement of the Federal Rules, and the protection of the federal courts, the defendants and the other shareholders involved from the fraud and imposition created by the filing of false affidavits.

There is nothing in the record in this case or in the history of derivative actions to suggest that the holding of the Court of Appeals would impair in the slightest the enforcement of the Securities Acts or the procedures for securing redress against improper actions by corporate management. The Court of Appeals stated repeatedly that shareholder-verifiers may rely substantially upon information received from attorneys or other advisers and that a plaintiff need not recall technical factual information in order to satisfy Rule 23(b). The only requirements are those inherent in any swearing to facts on which a lawsuit is based:

“But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties

against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint." (R. 236).

It is patently absurd to suggest that such a test will disqualify any potential shareholder-plaintiffs. Any plaintiff who is not a mere puppet will have no problem in satisfying it. To suggest otherwise is to indulge the incredible presumption that bona fide shareholder derivative actions are commenced in which neither the plaintiff nor his fiduciaries have any understanding of the transactions involved, or the charges made, or the reasons why the charges are believed to be soundly based, and *have no belief in the truth of the serious charges being made*.

Furthermore, the dismissal of this action does not destroy or in any way impair any cause of action under the Securities Acts. Any causes of action Hilton Hotels Corporation may have had, based upon the transactions referred to in the petitioner's complaint, were unaffected by the dismissal of this action and may be asserted by the corporation or by another shareholder. See *Costello v. United States*, 365 U.S. 265 (1961).

Petitioner's counsel have been unable to cite a single case in the long history of shareholder derivative litigation which would have been dismissed under the Rule as interpreted by the Court of Appeals. At this point, the record shows a plaintiff without knowledge of the lawsuit who has filed a false affidavit. Does this mean that an unsophisticated plaintiff cannot bring such an action? It does not; it means simply that, until Rule 23(b) has been complied with, whether by the plaintiff or some other knowledgeable affiant, there is no proper basis for the derivative action.

Petitioner's Security Act public policy argument is merely a smoke screen designated to obscure the real issues of the appeal.

III.

PETITIONER DELIBERATELY CONFRONTED THE TRIAL COURT WITH A CHOICE BETWEEN NULLIFICATION OF RULE 23(b) AND DISMISSAL—DISMISSAL WAS PARTICULARLY APPROPRIATE IN THESE CIRCUMSTANCES.

The Court of Appeals held that the District Judge properly dismissed the complaint on the basis of Rule 41(b) FRCP. That rule expressly provides:

“For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.”

Again finding the express provisions of the Federal Rule against her, petitioner argues against a “strict and technical” interpretation and asserts that the dismissal is not consistent with the “spirit and purpose of the Federal Rules.” This approach is, of course, reminiscent of petitioner’s argument concerning Rule 23(b), for acceptance of petitioner’s argument in the circumstances of this case would be a nullification of Rule 41 as it would be of Rule 23(b).

Petitioner’s suggestion for the enforcement of the Federal Rules is contained in Page 53 of her brief:

“Instead of dismissing, the distiet court, once satisfied . . . (that the signature of counsel was proper under Rule 11) should have required defendants to answer.”

In other words, once the trial court found that the petitioner had violated Rule 23(b) and persisted in that violation, the court should have ignored or condoned the

violation and permitted the action to proceed without compliance with the Rule. This is no "liberal" interpretation. It is a proposal for nullification of the Federal Rules of Civil Procedure promulgated by this Court. Such a proposal deserves no judicial consideration.

The Remedy of Dismissal, Which Barred Further Action on This Claim By This Shareholder But Not the Corporate Cause of Action, Was Peculiarly Appropriate Under the Circumstances.

The Surowitz deposition and the Brilliant affidavit demonstrated that the instigator of this action, a substantial and extremely sophisticated stockholder, had induced his mother-in-law to file the action and execute a blatantly untruthful affidavit of verification when she had not the slightest comprehension of the gravity of the charges she was making. When this deceit was called to the trial court's attention, petitioner's counsel spurned the trial court's suggestions that the defect be corrected by adding additional parties plaintiff, or by substitute verification. Counsel insisted in the trial court, as they do in this Court, that they had a right to proceed without complying with Rule 23(b). Since the trial court could not force them to file a proper verification, the only alternative to a nullification of the Rules was dismissal.

Petitioner attacks the dismissal as too harsh to fit the "crime." In fact, however, the trial court's action accomplished a just result. It barred the action by this particular shareholder as a necessary consequence of her refusal to comply with the Rules. On the other hand, the dismissal had no effect upon the underlying corporate

cause of action.* *Costello v. United States*, 365 U.S. 265 (1961).

In fact, the results in this case were much less "harsh" than the effect of this Court's decision in *Link v. Wabash Ry. Co.*, 370 U.S. 626 (1962). There, certain pretrial delays, culminating in the failure of plaintiff's counsel to attend a pretrial conference, resulted in a dismissal with prejudice which permanently barred the plaintiff's cause of action for personal injuries. If that case involved "aggravated" circumstances justifying dismissal, as petitioner's brief suggests (Pet. Br. 51-52), there can be no doubt that the circumstances in this case not only justified but compelled dismissal.

In the *Link* case plaintiff suffered dismissal by reason of a default committed by his counsel. Here the complaint was dismissed by reason of petitioner's own false affidavit. In *Link* the plaintiff was given no warning or chance to correct his counsel's default. Dismissal was immediate. In this case petitioner and her counsel were given every opportunity to correct the defect. The trial judge made repeated, detailed suggestions as to the means of correction. Dismissal came only after counsel rejected these suggestions and insisted upon standing on the false affidavit. Finally, in *Link* the dismissal completely extinguished the plaintiff's personal cause of action for injuries. In this case the underlying cause of action, that of the corporation, is preserved intact and only the right of the offending shareholder to prosecute that corporate cause of action is extinguished.

* The continuing vitality of the corporate cause of action is demonstrated by the fact that a shareholder's derivative action complaining of the identical stock transactions referred to in the complaint in the case at bar is at issue and approaching trial in the Chancery Court of Delaware, *119 Fifth Avenue Corp. v. Bechhold, et al.*, Civil Action No. 1863.

In fact, despite the contrary suggestion in petitioner's brief, there is nothing novel about dismissals for failure to comply with the Federal Rules.

The following cases are examples of many decisions which have sustained dismissals under the first sentence of Rule 41(b) for failure of prosecution, or for failure to comply with the Federal Rules or with orders of court. *Package Machinery Co. v. Hayssen Mfg. Co.*, 266 F.2d 56 (7th Cir. 1959) (failure of plaintiff to specify trade secrets he claimed were stolen by defendant); *Maddox v. Shroyer*, 302 F.2d 903 (D.C. Cir. 1962) *cert. denied*, 371 U.S. 825 (1962) (persistent failure to comply with Federal Rules concerning pleadings); *O'Brien v. Sinatra*, 315 F.2d 637 (9th Cir. 1963) (failure to comply with rules and court order concerning separate statement of different causes of action); *Blake v. DeVilbiss*, 118 F.2d 346 (6th Cir. 1941) (failure to comply with rules and court orders concerning pleading); *Martin v. Hunt*, 29 F.R.D. 14, 16 (D. Mass. 1961) (same).

In a large number of other decisions Federal courts have held (without specific reference to Rule 41(b)) that shareholders' derivative actions *must* be dismissed if the plaintiff shareholder does not comply with the requirements of Rule 23(b), including verification. In *Johnson v. Brandon Corporation*, 183 F. 2d 444 (4th Cir. 1950), the court affirmed the dismissal of a derivative action solely on the ground that the plaintiff had not complied with the verification and other requirements of Rule 23(b). In *Pikor v. Cinerama Products Corporation*, 25 F.R.D. 92, 96 (S.D.N.Y. 1960), and *Dalva v. Bailey*, 158 F. Supp. 204, 207 (S.D.N.Y. 1957), the original plaintiffs in the derivative action had been eliminated and the issue concerned the

propriety of intervention by other shareholders. In each case the courts held that intervention would not be permitted unless the new plaintiffs filed verified complaints which satisfied the requirements of Rule 23(b). See also *Marcus v. Textile Banking Co.*, 38 F.R.D. 185, 186 (S.D. N.Y. 1965) (Absence of verification a "fatal defect.")

Other cases in which all or part of derivative causes of action have been dismissed because of failure to comply with one or the other of the provisions of Rule 23(b) include *Weinhaus v. Gale*, 237 F.2d 197 (7th Cir. 1956); *Quirke v. St. Louis-San Francisco Ry. Co.*, 277 F.2d 705 (8th Cir. 1960), *cert. denied*, 363 U.S. 845 (1960); *Haffer v. Voit*, 219 F.2d 704 (6th Cir. 1955); *Wachsman v. Tobacco Products Corporation of New Jersey*, 129 F.2d 815 (3rd Cir. 1942); *Lucking v. Delano*, 129 F.2d 283 (6th Cir. 1942); *Gottesman v. General Motors Corp.*, 28 F.R.D. 325 (S.D. N.Y. 1961); *Milvy v. Adams*, 16 F.R.D. 105 (S.D.N.Y. 1954); remanded on other grounds 217 F.2d 647 (2d Cir. 1954); *Kaufman v. Wolfson*, 136 F. Supp. 939 (S.D.N.Y. 1955); *Elkins v. Bricker*, 23 F.R. Service 23b.1 Case 2 (S.D.N.Y. 1956); *Hausman v. Bailey*, 22 F.R.D. 304 (S.D.N.Y. 1958); *Gunn v. Voss*, 154 F. Supp. 345 (D. Wyo. 1957); *Lissauer v. Bertles*, 37 F. Supp. 881 (S.D.N.Y. 1940); *Robbins v. Sperry Corporation*, 1 F.R.D. 220 (S.D.N.Y. 1940); *Hudson v. Davies, Richberg, Tydings, Beebe & Landa*, 13 F.R.D. 130 (S.D.N.Y. 1952); *Leviton v. Stout*, 97 F. Supp. 105 (W.D. Ky. 1951); *Jewish Consumptives Relief Society v. Rothfeld*, 9 F.R.D. 64, 67 (S.D.N.Y. 1949); *Varanelli v. Wood*, 9 F.R.D. 61 (S.D.N.Y. 1949); *Bruce and Company v. Bothwell*, 8 F.R.D. 45 (S.D.N.Y. 1948); *Abrahams v. Parkins*, 36 F. Supp. 238 (W.D. Pa. 1940); *Isaac v. Milton Mfg. Company*, 33 F. Supp. 732, 738 (M.D. Pa. 1940); *Henis v. Compania Agricola de Guatemala*, 116 F. Supp.

223 (D. Del. 1953), *aff'd*, 210 F.2d 950 (3d Cir. 1954); *Bowman v. Alaska Air Lines, Inc.*, 14 F.R.D. 70 (D. Alas. 1952); *Pergament v. Frazer*, 93 F. Supp. 9, 12 (E.D. Mich. 1949); *Lynch v. Yonkers National Bank & Trust Company*, 3 F.R. Serv. 23b.1 Case 1 (S.D.N.Y. 1940); *Bauer v. Servel, Inc.*, 168 F. Supp. 478 (S.D.N.Y. 1958); *McPhail v. Gum Products*, 11 F.R.D. 299 (D. Mass. 1951); *Toomey v. Wickwire Spencer Steel Co.*, 3 F.R.D. 243 (S.D.N.Y. 1942); *McQuillen v. National Cash Register Company*, 112 F.2d 877 (4th Cir. 1940), *cert. denied*, 311 U.S. 6 (1940).

Enforcement of the Federal Rules is necessary for the orderly administration of justice. Dismissal for violation of the rules could be "harsh" or "technical" only if no sufficient opportunity were afforded for correction and amendment. In this case there existed not only opportunity but express invitation by the trial court to substitute a proper verification. Petitioner's failure to accept these invitations was a deliberate choice. Her insistence that she be relieved of the consequence of this choice by the nullification of the Federal Rules and by the condonation of the filing of a false affidavit is unworthy of consideration by this Court.

IV.

PETITIONER'S ATTEMPT TO FORECLOSE DEFENDANTS FROM FILING ADDITIONAL MOTIONS AUTHORIZED BY THE FEDERAL RULES SHOULD BE REJECTED.

In view of petitioner's insistence upon relying upon a patently false and therefore inadequate affidavit of verification, there is no basis for any remandment to the trial court. Nevertheless, if the case should be remanded on any ground, there is no basis for petitioner's suggestion that "the cause be remanded with instructions to reinstate the

complaint and to require the defendants to answer." (Pet. Br. 54) When petitioner's deposition was taken, respondents' time for answer or filing of motions had not expired. The deposition revealed the utter false and sham character of petitioner's verification and therefore presented an issue independent of and preliminary to any other questions. In their motion to dismiss, respondents specifically reserved the right to file any other motions. (R. 117-118) The order of the District Court entered February 26, 1964, the day the motion to dismiss was presented, specifically extended the time for defendants to file "responsive pleadings" to April 2, 1964. (R. 120). Since the District Judge dismissed the complaint on March 30, 1964, this order preserved the respondents' rights in the event of a remandment to file within the time limits specified by the Rules such other motions as they may believe are proper under the Federal Rules. There is no basis for petitioners' demand that this Court issue a remanding order which would foreclose respondents' rights in this respect.

CONCLUSION.

There are, therefore, at least three grounds for the affirmance of the decision below. Each is alone sufficient to justify dismissal.

The first is the fraud perpetrated by the filing of a false affidavit: " * * * plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." (R. 235). As this Court has said, in another false oath case:

"[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good

order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

The second ground is the failure of petitioner to comply with the requirements of Rule 23(b) which required verification of the complaint—not merely of part of the complaint—for good reasons. The filing of a false oath is the filing of no oath, and there has been no compliance with Rule 23(b).

Finally, there is the fact that petitioner here was a puppet plaintiff, one who not only had to depend upon others for all of the facts on which her cause of action was allegedly based but, more, was wholly lacking in comprehension of what she was suing about or with what "crimes" she was charging others. True it is that every protection must be afforded the uneducated and the unsophisticated, true it is that the courts must be jealous to assure such investors are not denied their day in court for technical reasons.

No such protection, no such jealousy is justified in ignoring that basic requirement of all lawsuits, parties who comprehend the gravamen of their actions. If the party cannot so comprehend, then there must be an appropriate representative who can and does. If that fundamental is not provided, then the courts will be open to lawyer litigation, and a sad day will have dawned in the world of jurisprudence. This is even more true in the instant case, where petitioner was not only a puppet, but where the very costs of the lawsuit were being borne by others, by those very individuals who were associated with the skilled lawyer, economics major and investment counselor, Mr. Brilliant, who was pulling the strings.

There is no question of plaintiff being denied a cause of action by the order here appealed. The cause of action is not that of petitioner, but rather of the corporation, or of any other of its thousands of shareholders. Plaintiff is required only to comply with the Federal Rules, and to refrain from attempting the fraud of a false affidavit.

The record clearly demonstrates that the trial court's action in dismissing the complaint was caused by the flagrant and persistent failure by petitioner and her counsel to comply with the Federal Rules of Civil Procedure. The Court of Appeal's affirmance of the trial court's action was proper and indeed necessary to enforce the Federal Rules. The dismissal should be affirmed.

Respectfully submitted,

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APPENDIX

REGULATION OF SHAREHOLDER DERIVATIVE ACTIONS BY STATE STATUTES OR RULES OF COURT

| | Requirement That Com- plaint in Derivative Ac- tion Be Verified | Requirement That Com- plaint in Derivative Ac- tion Allege That Plain- tiff Was Shareholder at Time of Alleged Wrong- doing | Requirement That Com- plaint in Derivative Ac- tion Describe Efforts by Plaintiff To Secure Ac- tion by Directors or Shareholders | Provisions for Security for Expenses in Deriva- tive Actions | Requirement That All Settlements of Deriva- tive Actions Be Ap- proved by the Court |
|-------------|---|--|--|--|--|
| Alabama | — | — | — | — | Alabama Equity Rule 31(b) |
| Alaska | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Arizona | Rule 23 (b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Arkansas | — | — | — | — | — |
| California | — | Calif. Corp. Code §834 | Calif. Corp. Code §834 | Calif. Corp. Code §834 | — |
| Colorado | — | Colo. Rev. Stat. §31-30-21 | Rule 23(b), Rules of Civil Procedure | Colo. Rev. Stat. §31-30-21 | Rule 23(c), Rules of Civil Procedure |
| Connecticut | — | — | — | — | — |
| Delaware | — | Del. Code Ann. Tit. 8 §327; Chancery Rule 23(b) | Chancery Rule 23(b) | — | Chancery Rule 23(c) |
| Florida | — | Florida Stat. Ann. §608.131 | Florida Stat. Ann. §608.131 | Florida Stat. Ann. §608.131 | Florida Stat. Ann. §608.131 |
| Georgia | — | — | — | — | — |
| Hawaii | — | — | — | — | — |
| Idaho | Rule 23 (b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | Rule 23(b) Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Illinois | — | Ill. Rev. Stat. ch. 32 §157.45a | — | — | Ill. Rev. Stat. ch. 110, §52.1 |
| Indiana | — | — | — | — | Burns Ann. Ind. Stat. §2-220 |

| | Requirement That Complaint in Derivative Action Be Verified | Requirement That Complaint in Derivative Action Allege That Plaintiff Was Shareholder at Time of Alleged Wrongdoing | Requirement That Complaint in Derivative Action Describe Efforts by Plaintiff To Secure Action by Directors or Shareholders | Provisions for Security for Expenses in Derivative Actions | Requirement That All Settlements of Derivative Actions Be Approved by the Court |
|---------------|---|---|---|--|---|
| Iowa | Rule 44, Rules of Civil Procedure | Iowa Code Ann. §496A.43 | Rule 44, Rules of Civil Procedure | — | Rule 45, Rules of Civil Procedure |
| Kansas | — | Kan. Stat. Ann. §60-223(b) | Kan. Stat. Ann. §60-223(b) | — | Kan. Stat. Ann. §60-223(c) |
| Kentucky | — | Ky. Rev. Stat. §271.605 | Ky. Rev. Stat. §271.605 | — | Rule 23.02, Rules of Civil Procedure |
| Louisiana | La. Code of Civil Procedure, Art. 596 | La. Code of Civil Procedure, Art. 596 | La. Code of Civil Procedure, Art. 596 | — | La. Code of Civil Procedure, Art. 594 |
| Maine | Rule 23(b), Rules of Civil Procedure | — | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Maryland | — | — | — | Md. Rules of Procedure, Rule 328(b) | Md. Rules of Procedure, Rule 209(d) |
| Massachusetts | — | Ann. Laws of Mass. ch. 156B, §46 | — | — | — |
| Michigan | General Court Rule 208.2 | — | General Court Rule 208.2 | — | General Court Rule 208.5 |
| Minnesota | — | — | Rule 23.02, Rules of Civil Procedure | — | Rule 23.03, Rules of Civil Procedure |
| Mississippi | — | Miss. Code Ann. §5309-93 | — | — | — |
| Missouri | — | Vernon's Ann. Mo. Stat. §507.070; Rule 52.08(b), Rules of Civil Procedure | Vernon's Ann. Mo. Stat. §507.070; Rule 52.08(b), Rules of Civil Procedure | — | Vernon's Ann. Mo. Stat. §507.070; Rule 52.08(c), Rules of Civil Procedure |
| Montana | — | — | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |

| | Requirement That Complaint Be Verified | Requirement That Complaint in Derivative Action Alleges That Plaintiff Was Shareholder at Time of Alleged Wrongdoing | | Requirement That Complaint in Derivative Action Describe Efforts by Plaintiff To Secure Action by Directors or Shareholders | | Provisions for Security for Expenses in Derivative Action | Requirement That All Settlements of Derivative Action Be Approved by the Court |
|----------------|---|--|---|---|---|---|--|
| | | Rev. Stat. of Neb. §21-2047 | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rev. Stat. of Neb. §21-2047 | |
| Nebraska | — | — | — | — | — | — | — |
| Nevada | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Rule 23(b), Rules of Civil Procedure; Chapter 504 (53rd Sess. 1965) | Chapter 504 (53rd Sess. 1965) | — | Rule 23(c), Rules of Civil Procedure |
| New Hampshire | — | — | — | — | — | — | — |
| New Jersey | Civil Practice Rule 4:36—2 | Civil Practice Rule 4:36—2; N.J. Stat. Ann. Tit. 14, §3-16 | Civil Practice Rule 4:36—2 | Civil Practice Rule 4:36—2 | N.J. Stat. Ann. Tit. 14, §3-15 | — | Civil Practice Rule 4:36—3 |
| New Mexico | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | Rule 23(b), Rules of Civil Procedure | — | — | Rule 23(c), Rules of Civil Procedure |
| New York | — | Bus. Corp. Law §626 | Bus. Corp. Law §626 | Bus. Corp. Law §626 | Bus. Corp. Law §627 | — | Bus. Corp. Law §626 |
| North Carolina | — | — | — | — | — | — | — |
| North Dakota | — | N.D. Cent. Code §10-19-48 | N.D. Cent. Code §10-19-48 | Rule 23(b), Rules of Civil Procedure | N.D. Cent. Code §10-19-48 | — | Rule 23(c), Rules of Civil Procedure |
| Ohio | — | Page's Ohio Rev. Code Ann., Tit. 23, §2307.311 | Page's Ohio Rev. Code Ann., Tit. 23, §2307.311 | Page's Ohio Rev. Code Ann., Tit. 23, §2307.311 | — | — | — |
| Oklahoma | — | — | — | — | — | — | — |
| Oregon | — | — | — | — | — | — | — |
| Pennsylvania | — | Purdon Penna. Stat. Ann. Tit. 15, §2852-516 | Purdon Penna. Stat. Ann. Tit. 15, §2852-516 | — | Purdon Penna. Stat. Ann. Tit. 15, §2852-516 | — | Rule 230(b), Rules of Civil Procedure |

| | Requirement That Complaint in Derivative Action Be Verified | Requirement That Complaint in Derivative Action Allege That Plaintiff Was Shareholder at Time of Alleged Wrongdoing | Requirement That Complaint in Derivative Action Describe Efforts by Plaintiff To Secure Action by Directors or Shareholders | Provisions for Security for Expenses in Derivative Actions | Requirement That All Settlements of Derivative Actions Be Approved by the Court |
|----------------|---|---|---|--|---|
| Rhode Island | — | — | — | — | — |
| South Carolina | — | — | — | — | — |
| South Dakota | — | — | — | — | — |
| Tennessee | — | — | — | — | — |
| Texas | — | — | — | Business Corp. Act Art. 5.14 | Rule 42(b), Rules of Civil Procedure |
| Utah | — | — | Rule 23(b) Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Vermont | — | — | — | — | — |
| Virginia | — | — | — | — | — |
| Washington | Wash. Court Rule 23(b) | Wash. Court Rule 23(b) | Wash. Court Rule 23(b) | — | Wash. Court Rule 23(c) |
| West Virginia | Rule 23(b), Rules of Civil Procedure | — | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |
| Wisconsin | — | West's Wisc. Stat. Ann. Tit. 17, §180.405 | West's Wisc. Stat. Ann. Tit. 17, §180.405 | West's Wisc. Stat. Ann. Tit. 17, §180.405 | West's Wisc. Stat. Ann. Tit. 17, §180.405 |
| Wyoming | Rule 23(b), Rules of Civil Procedure | — | Rule 23(b), Rules of Civil Procedure | — | Rule 23(c), Rules of Civil Procedure |

This Appendix lists only regulations which are imposed by statute or rule of court and which apply specifically to derivative actions alone or, in the case of the requirement of court approval for settlements, to derivative actions and to other class actions. No attempt has been made to include regulations imposed by case law or regulations applicable to all civil actions. For example, an Arkansas statute requiring verification of all civil actions has been excluded from the Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, **CONRAD M.
HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY,
JOSEPH P. BINNE, SPEARL ELLISON, HENRY CROWN,
HORACE C. FLANIGAN, REYNOLD M. BECKHOLD, Y. FRANK
FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM
D. YOUNG, FRITZ R. BURNS, VERNON HERNDON, HERBERT
C. BLUNCK, CHARLES L. FLETCHER, ROBERT A.
GROVES, JOSEPH A. HARPER, MARRON HILTON AND
HILTON CREDIT CORPORATION,** a corporation,

Respondents.

Petition for Rehearing

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, **CONRAD N.
HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY,
JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN,
HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK
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D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERB-
ERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A.
GROVES, JOSEPH A. HARPER, BARRON HILTON AND
HILTON CREDIT CORPORATION,** a corporation,

Respondents.

Petition for Rehearing

Respondents respectfully petition this Court to grant rehearing of this cause and thereafter to affirm the judgment of the District Court and the Court of Appeals.

The only issues on this appeal are (1) the interpretation of the verification requirement which Rule 23(b) imposes in all shareholder derivative actions, and (2) whether the verification filed in this case complied with the Rule as so interpreted.

Instead of determining these issues, the Court's Opinion erects and demolishes two straw men: first, that this is not a "strike suit," and second, that an affirmance would prevent any "unsophisticated shareholder" from bringing a derivative suit. Then, after discussing these points at length, but without the citation of a single precedent and without any analysis of the meaning of Rule 23(b), the Court finds for the petitioner. The Opinion of March 7, 1966 will inevitably be regarded by the lower courts, the Bar, and commentators as a judicial repeal of the Rule.

Respondents have grounded their arguments solely upon petitioner's failure to comply with Rule 23(b). Respondents have never contended that this action is a "strike suit". Yet the Court's Opinion considers this "issue" in depth and bases a decision for the petitioner on the determination that this is not a "strike suit." This determination has no relevance to the question whether the specific requirements of Rule 23(b) have been met.

The Opinion also adopts petitioner's straw man argument that the decision in this case will determine whether "ignorant and unsophisticated" shareholders can bring derivative actions, and that a decision for the petitioner is necessary to prevent respondents from escaping, because of a technicality, from serious charges. This argument represents a complete misunderstanding of the course and significance of the proceedings in the lower courts. It creates a dilemma for all judges called upon to determine the degree to which any Federal Rule of Civil Procedure must be obeyed.

Acceptance of the "unsophisticated shareholders" argument does a genuine injustice to the lower courts. Neither the Trial Judge nor the Court of Appeals dismissed this

action because petitioner was "ignorant and unsophisticated." The Findings of Fact and Conclusions of Law of the District Judge and the Opinion of the Court of Appeals reveal that this action was dismissed solely because of petitioner's failure to comply with the verification requirements of Rule 23(b).

The "ignorant shareholders" argument ultimately rests upon a contention that such shareholders cannot comply with Rule 23(b) as construed by the Court of Appeals, and that therefore this Court is forced either to (a) judicially repeal Rule 23(b) so as to uphold the verification in this case, or (b) deny legal redress for "unsophisticated" shareholders. This choice is not presented by either shareholders' actions in general or this action in particular.

The fallacy of petitioner's argument and of the Court's Opinion on this score lies in the assumption that only the plaintiff of record may verify. Respondents have consistently recognized that, in proper circumstances, a complaint may be verified by an agent or attorney on behalf of the party plaintiff. In any case in which an investigation has been made sufficient to bring a derivative action in good faith, there must be some person, be he plaintiff, agent or attorney, with sufficient knowledge of the facts to make a truthful verification. *No bona fide derivative action need be barred by the enforcement of Rule 23(b) as construed by the Opinion of the Court of Appeals.*

In this particular case both petitioner's son-in-law, Mr. Brilliant, and her counsel claimed in their affidavits to have sufficient knowledge or information to make a truthful

verification. The record demonstrates that the Trial Judge repeatedly suggested that the matter might be resolved by the filing of a substitute verification. (R. 175-6, 185) The failure of counsel to do this, in part because, as they conceded on oral argument, they wanted the issue of Mrs. Surowitz' verification resolved by this Court, merely underscores the fact that correction was available in this case. Thus the purported dilemma of the "ignorant and unsophisticated" shareholder is a wholly specious issue.

Furthermore, although emphasized in the Opinion as a threat to the beneficial purposes of the federal securities laws (Op. p. 10), enforcement of Rule 23(b) in this case could not possibly permit respondents to escape trial on the merits of the charges made in the petitioner's complaint. At page 11 of the Opinion it is stated:

"It has now been practically three years since the complaint was filed and as yet not one of the defendants has ever been compelled to admit or deny the wrongdoings charged."

But, in fact, as respondents have pointed out (Resp. Br. 61):

"A shareholder's derivative action complaining of the identical stock transactions referred to in the complaint in the case at bar is at issue and approaching trial in the Chancery Court of Delaware, *149 Fifth Ave. Corp. v. Bechhold, et al.*, Civil Action No. 1863."

The Delaware action is at issue by reason of an answer filed by the defendants there (respondents here) which denies each and every allegation of fact charging fraud, misrepresentation, concealment, or breach of fiduciary duty in the two transactions challenged by the petitioner here. The denials encompass every charge of wrongdoing made

in the complaint in the case at bar. Consequently, the Opinion, insofar as it suggests, after stating the petitioner's charges in detail, that respondents have been unwilling to admit or deny these charges, inadvertently misstates the facts. More important, insofar as the Opinion rests upon the assumption that there will be no trial on the merits of these charges unless petitioner wins this appeal, it is grounded upon a mistaken assumption.

Although deciding the two straw man arguments just discussed, the Court did not come to grips with the central and only issue decided below: the interpretation of the verification requirement of Rule 23(b). The only suggestion, in the Opinion, of an interpretation of the Rule which would characterize Mrs. Surowitz' affidavit as a proper verification rests upon an assumption that a verification may be made without any information or understanding, in blind faith upon the general assurances of another person. Thus, on page 7 of the Opinion, this Court recognizes that the lower courts correctly found that Mrs. Surowitz did not understand any of the legal relationships or business transactions in the complaint, and that she knew only:

"that she had put over \$2,000 of her hard earned money into Hilton Hotels stock, that she was not getting her dividends, and that her son-in-law had looked into the matter and had thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him."

If the foregoing is accepted as a sufficient basis for a truthful verification under Rule 23(b), that Rule has in fact been repealed. Such a verification is utterly inconsistent with the language of the verification actually drafted, signed and filed by the petitioner, which states

unequivocally that she is "familiar" with the allegations of the complaint, that she knows some of them to be true, and that she makes the others on information and belief.

While the Opinion states (p. 2) that the language of petitioner's verification was "in strict compliance with the provisions of Rule 23(b) * * *", the uncontroverted fact is that

" . . . Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her that the statements in the complaint were either true or to the best of his knowledge *he* believed them to be true." (emphasis supplied) (Op. p. 7.)

Thus Mrs. Surowitz did not have either the knowledge or the information and belief to make *her* verification anything but sham. The Opinion, by accepting this sham, has raised form to power over substance, and has made a nullity of Rule 23(b).

Since the acceptance of such a verification *in effect* repeals Rule 23(b) *pro tanto*, it is not surprising that many members of the Bar and of the business community have treated the opinion as an explicit holding that a shareholder plaintiff need not comply with Rule 23(b) at all, unless defendants show that the action is a "strike suit." The discussion at pages 8-9 of the Opinion seems to suggest that, since the action was brought in good faith and on the basis of an investigation, and since "this is not a strike suit or anything akin to it," the action could not be dismissed, regardless of whether a truthful or a false verification had been filed. This interpretation of the Opinion was apparently adopted by the C.C.H. Federal Securities Law Reports, which summarized this Court's

Opinion in its March 9, 1966 Report Letter by stating, in part:

“The United States Supreme Court has ruled that a stockholder may bring suit under the Federal Securities Law even though the verification requirements of Rule 23(b) of the Federal Rules of Civil Procedure were not met. . . .”

Certainly this Court is not bound by the interpretation given its Opinion by any commentator, nor can lower federal courts and attorneys accept blindly such interpretation. It is, however, respectfully suggested that the Opinion of March 7, 1966 lends itself to the interpretation quoted above. It is also respectfully suggested that, until repealed by appropriate action, the language of Rule 23(b) unambiguously requires a verification in all derivative actions, and provides no basis for an “interpretation” that the verification requirement is to be excused unless defendants affirmatively show that a plaintiff is acting in bad faith.

Respondents respectfully suggest that petitioner’s verification can be upheld only through an overt or tacit judicial repeal of the provisions of Rule 23(b). If the Court is convinced of the wisdom of such repeal, it should be done only through the well-established rule-making processes and not by judicial decision. *United States v. Robinson*, 361 U.S. 220, 229 (1960); *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 322-324 (1959); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964); *Miner v. Atlass*, 363 U.S. 641 (1960).

Even if repeal is to be effected by judicial decision, it should not be done in words that repudiate the lower courts' enforcement of the unambiguous language of Rule 23(b), and which charge those courts with preventing "unsophisticated litigants from ever having their day in court." (Op. p. 10.)

Respectfully submitted,

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STATE OF ILLINOIS }
COUNTY OF COOK } ss

Samuel W. Block, on oath, states that he is one of the counsel for Respondents, and that this Petition for Re-hearing is presented in good faith and not for delay.

Subscribed and sworn to
before me this day
of March, 1966.

.....
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 161.—OCTOBER TERM, 1965.

| | | |
|---|---|---|
| Dora Surowitz, etc., Petitioner, v. Hilton Hotels Corporation et al. | } | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. |
|---|---|---|

[March 7, 1966.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, Dora Surowitz, a stockholder in Hilton Hotels Corporation, brought this action in a United States District Court on behalf of herself and other stockholders charging that the officers and directors of the corporation had defrauded it of several million dollars by illegal devices and schemes designed to cheat the corporation and enrich the individual defendants. The acts charged, if true, would constitute frauds of the grossest kind against the corporation, and would be in violation of the Securities Act of 1933,¹ the Securities Exchange Act of 1934,² and the Delaware General Corporation Law.³ Summarily stated, the detailed complaint, which takes up over 60 printed pages, charges first that defendants conceived and carried out a deceptive plan under which the Hilton Hotels Corporation through a formal "offer" mailed to all the stockholders, purchased from them some 300,000 shares of its outstanding common stock, that these defendants manipulated the stock's market price to an artificially high level and then at this inflated price sold some 100,000 shares of their own stock to the corporation, and that the effect of this offer and purchase was to reduce the corporation's working capital more than \$8,000,000 at a time when its financial condi-

¹ 48 Stat. 74, as amended; 15 U. S. C. § 77a *et seq.* (1964 ed.).

² 48 Stat. 881, as amended; 15 U. S. C. § 78a *et seq.* (1964 ed.).

³ 8 Del. Code § 101 *et seq.* (1953 ed.).

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tion was weak, and the funds were badly needed to run the corporation's business. The second deceptive scheme charged in the complaint was that the same defendants all of whom were stockholders of the Hilton Credit Corporation caused the Hilton Hotels Corporation to purchase also at an artificially high price more than a million shares of the Hilton Credit Corporation stock, paying about \$3,441,000 for it, of which over \$2,000,000 was personally received by the defendants here. The complaint was signed by counsel for Mrs. Surowitz in compliance with Rule 11 of the Federal Rules of Civil Procedure which provides that "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Also pursuant to Rule 23 (b) of the Federal Rules, the complaint was verified by Mrs. Surowitz, the petitioner, who stated that some of the allegations in the complaint were true and that she "on information and belief" thought that all the other allegations were true.

So far as the language of the complaint and of Mrs. Surowitz's verification were concerned, both were in strict compliance with the provisions of Rule 23 (b) which states that a shareholder's complaint in a secondary action must contain certain averments and be verified by the plaintiff.⁴ Notwithstanding the sufficiency

⁴"(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint

of the complaint and verification under Rule 23 (b), however, the court, without requiring defendants to file an answer and over petitioner's protest, granted defendants' motion to require Mrs. Surowitz to submit herself to an oral examination by the defendants' counsel. In this examination Mrs. Surowitz showed in her answers to questions that she did not understand the complaint at all, that she could not explain the statements made in the complaint, that she had a very small degree of knowledge about what the lawsuit was about, that she did not know any of the defendants by name, that she did not know the nature of their alleged misconduct, and in fact that in signing the verification she had merely relied on what her son-in-law had explained to her about the facts in the case. On the basis of this examination, defendants moved to dismiss the complaint, alleging that "1. It is a sham pleading, and 2. Plaintiff, Dora Surowitz, is not a proper party plaintiff" In response, Mrs. Surowitz's lawyer, in an effort to cure whatever infirmity the court might possibly find in Mrs. Surowitz's verification in light of her deposition, filed two affidavits which shed much additional light on an extensive investigation which had preceded the filing of the complaint. Despite these affidavits the District Court dismissed the case holding that Mrs. Surowitz's affidavit was "false," that being wholly false it was a nullity, that being a nullity it was as though no affidavit had been made in compliance with Rule 23, that being false the affidavit was a "sham" and Rule 23 (b) required that he dismiss her case, and he did so, "with prejudice."

shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

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The Court of Appeals affirmed the District Court's dismissal, saying in part:

"We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." 342 F. 2d, at p. 606.

The Court of Appeals reached its conclusion that the case must be dismissed under Rule 23 (b) and Rule 41 (b) despite the fact that the charges made against the defendants were viewed as very serious and grave charges of fraud and that "many of the material allegations of the complaint are obviously true and cannot be refuted." 342 F. 2d, at 607. We cannot agree with either of the courts below and reverse their judgments. We do not find it necessary in reversing, however, to consider all the numerous arguments made by respondents based on the origin, history and utility of Rule 23, and of derivative causes of action and class suits. No matter how much weight we give to the function of the Rule and of class action proceedings in protecting corporate management against so-called "nuisance" or "strike suits," we hold that the Rule cannot justify dismissal of this case on the record shown here.

At the time the District Court dismissed and the Court of Appeals approved, there were pending before those courts not merely the complaint, the verified statements by counsel and by Mrs. Surowitz, and the depositions of Mrs. Surowitz. But as noted above, two affidavits, one signed by Mrs. Surowitz's attorney in this case, Mr. Walter J. Rockler, and the other signed by her son-in-law, Mr. Irving Brilliant, had been submitted in response to the defendants' motion that the complaint be dismissed. These affidavits, as well as Mrs. Surowitz's deposition, are a part of the record before us here and

we shall now state the facts as they are illuminated by these affidavits.

Mrs. Surowitz, the plaintiff and petitioner here, is a Polish immigrant with a very limited English vocabulary and practically no formal education. For many years she has worked as a seamstress in New York where by reason of frugality she saved enough money to buy some thousands of dollars worth of stocks. She was of course not able to select stocks for herself with any degree of assurance of their value. Under these circumstances she had to receive advice and counsel and quite naturally she went to her son-in-law, Irving Brilliant. Mr. Brilliant had graduated from the Harvard Law School, possessed a master's degree in economics from Columbia University, was a professional investment advisor, and in addition to his degrees and his financial acumen, he wore a Phi Beta Kappa key. In 1957, six years before this litigation began, he bought some stock for his mother-in-law in the Hilton Hotels Corporation, paying a little more than \$2,000 of her own money for it. He evidently had confidence in that corporation because by 1960 he had purchased for his wife, his deceased mother's estate, a trust fund created for his children, and Mrs. Surowitz some 2,350 shares of the corporation's common stock, at a cost of about \$45,000 in addition to one of the corporation's \$10,000 debentures.

About December 1962, Mrs. Surowitz received through the mails a notice from the Hilton Hotels Corporation announcing its plan to purchase a large amount of its own stock. Because she wanted it explained to her, she took the notice to Mr. Brilliant. Apparently disturbed by it, he straightway set out to make an investigation. Shortly thereafter he went to Chicago, Illinois, where Hilton Hotels has its home office and talked the matter over with Mr. Rockler. Mr. Brilliant and Mr. Rockler

had been friends for many years, apparently ever since both of them served as a part of the legal staff representing the United States in the Nuremberg trials. The two decided to investigate further, and for a number of months both pursued whatever avenues of information that were open to them. By August of 1963 on the basis of their investigation, both of them had reached the conclusion that the time had come to do something about the matter. In the meantime the value of the corporation's stock had declined steadily, and in August the corporation failed to pay its usual dividend. In October, while a complaint was being prepared charging defendants with fraud and multiple violations of the federal securities acts and state law, Mr. Rockler met with defendants' lawyers. This conference, instead of producing an understanding, merely provided Mr. Brilliant and Mr. Rockler with information, not previously available to them, which increased their grave suspicions about the corporation's stock purchase and its management. For instance it was learned at this meeting that at the time of the stock purchase the president and chairman of the board of Hilton Hotels Corporation had purchased for an unusually high price over 100,000 shares of the corporation's stock from several trusts established by the vice president and director of the corporation. Finally, in December, or almost exactly one year after the corporation had submitted its questionable offer to purchase stock from its shareholders, this complaint was filed charging the defendants with creating and participating in a fraudulent scheme which had taken millions of dollars out of the corporation's treasury and transferred it to the defendants' pockets.

Soon after these investigations began Rockler prepared a letter for Mrs. Surowitz to send to the corporation protesting the alleged fraudulent scheme. Mr. Brilliant, her son-in-law, took the communication to Mrs.

Surowitz, explained it to her, and she signed it. Later, in August 1963, when the corporation declined to pay its dividend, Mrs. Surowitz, who had purchased the stock for the specific purpose of gaining a source of income, was sufficiently disturbed to seek Mr. Brilliant's counsel. He explained to her that he and Mr. Rockler were of the opinion that the corporation's management had wrongfully damaged the corporation, and together at that time Mrs. Surowitz and her son-in-law discussed the matter of her bringing this suit. When, on the basis of this conversation, Mrs. Surowitz stated that she agreed for suit to be filed in her name, Mr. Rockler prepared a formal complaint which he mailed to Mr. Brilliant. Mr. Brilliant then, according to both his affidavit and Mrs. Surowitz's testimony, read and explained the complaint to his mother-in-law before she verified it. Her limited education and her small knowledge about any of the English language, except the most ordinarily used words, probably is sufficient guarantee that the courts below were right in finding that she did not understand any of the legal relationships or comprehend any of the business transactions described in the complaint. She did know, however, that she had put over \$2,000 of her hard earned money into Hilton Hotels stock, that she was not getting her dividends, and that her son-in-law who had looked into the matter thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him. It is difficult to believe that anyone could be shocked or harmed in any way when, in the light of all these circumstances, Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her that the statements in the complaint were either true or to the best of his knowledge he believed them to be true.

We assume it may be possible that there can be circumstances under which a district court could stop all proceedings in a derivative cause of action, relieve the defendants from filing an answer to charges of fraud, and conduct a pre-trial investigation to determine whether the plaintiff had falsely sworn that the facts alleged in the complaint were either true or that he had information which led him to believe they were true. And conceivably such a pre-trial investigation might possibly reveal facts surrounding the verification of the complaint which could justify dismissal of the complaint with prejudice. However, here we need not consider the question of whether, if ever, Federal Rule 23 (b) might call for such summary action. Certainly it cannot justify the court's summary dismissal in this case. Rule 23 (b) was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage "strike suits" by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interest in order to enrich themselves. And it is not easy to conceive of anyone more in need of protection against such schemes than little investors like Mrs. Surowitz.

When the record of this case is reviewed in the light of the purpose of Rule 23 (b)'s verification requirement, there emerges the plain, inescapable fact that this is not a strike suit or anything akin to it. Mrs. Surowitz was not interested in anything but her own investment made with her own money. Moreover, there is not one iota of evidence that Mr. Brilliant, her son-in-law and coun-

selor, sought to do the corporation any injury in this litigation. In fact his purchases for the benefit of his family of more than \$50,000 of securities in the corporation, including a \$10,000 debenture, all made years before this suit was brought, manifest confidence in the corporation not a desire to harm it in any way. The Court of Appeals in affirming the District Court's dismissal, however, indicated that whether Mrs. Surowitz and her counselors acted in good faith and whether the charges they made were truthful were irrelevant once Mrs. Surowitz demonstrated in her oral testimony that she knew nothing about the content of the suit. That court said:

"Those affidavits reveal that substantial and diligent investigation by Brilliant, Rockler, and others preceded the filing of this complaint Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant knowledge or information other than the fact of her stock ownership." 342 F. 2d, at p. 607.

In fact the opinion of the Court of Appeals indicates in several places that a woman like Mrs. Surowitz, who is uneducated generally and illiterate in economic matters, could never under any circumstances be a plaintiff in a derivative suit brought in the federal courts to protect her stock interests.⁵

⁵ Consider, for example, these three excerpts taken from separate paragraphs in the Court of Appeals' opinion:

"We have considered all arguments advanced by the plaintiff. We have considered the record in the light of plaintiff's limited grasp of the English language and the intricacies of corporate finance. We have considered the peculiar position of a plaintiff in a suit such as this as, principally, the instrument through which the judicial machinery is set in motion. It is not unreasonable to state as a minimum requirement that the plaintiff have general knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges. We conclude

We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23 (b), like the other civil rules was written to further, not defeat the ends of justice. The serious fraud charged here, which of course has not been proven, is clearly in that class of deceitful conduct which the federal securities laws were largely passed to prohibit and protect against.

that any lesser requirement would make the verification provision farcical.

"But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint.

"We think the court below correctly held that a pleading governed by Rule 23 (b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand." 342 F. 2d, at pp. 608, 606, and 607-608.

There is, moreover, not one word or one line of actual evidence in this record indicating that there has been any collusive conduct or trickery by those who filed this suit except through intimations and insinuations without any support from anything any witness has said. The dismissal of this case was error. It has now been practically three years since the complaint was filed and as yet not one of the defendants has even been compelled to admit or deny the wrongdoings charged. They should be. The cause is reversed and remanded to the District Court for trial on the merits.

Reversed and remanded.

MR. JUSTICE FORTAS took no part in the decision of this case.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth and development. It begins with the first settlers who came to the continent in search of a new life. They found a land of vast resources and opportunities, but also one of challenges and hardships. Over time, the settlers grew into a nation, and the United States emerged as a powerful force in the world. The story of the United States is a story of the American dream, of the pursuit of happiness and freedom. It is a story of the people who have shaped the nation, and the values that have guided them. The history of the United States is a story of hope and possibility, of a land where anyone can achieve their dreams.

The United States has a rich and diverse history, with many different cultures and traditions. The people of the United States have made many contributions to the world, in the fields of science, art, and literature. The United States has also been a leader in the fight for civil rights and social justice. The history of the United States is a story of progress and achievement, of a nation that has overcome many challenges and emerged as a global superpower. The United States is a land of opportunity, where anyone can make their mark on the world.

The United States is a land of many firsts. It was the first country to declare independence from a European power. It was the first country to develop a system of government based on the principles of democracy. It was the first country to send a man to the moon. The United States has many other firsts, and it continues to be a land of innovation and discovery. The United States is a land of hope and possibility, where anyone can achieve their dreams.

The United States is a land of many challenges, but it is also a land of many opportunities. The United States has a long history of overcoming adversity, and it has a bright future ahead of it. The United States is a land of hope and possibility, where anyone can achieve their dreams. The United States is a land of progress and achievement, of a nation that has overcome many challenges and emerged as a global superpower. The United States is a land of opportunity, where anyone can make their mark on the world.

SUPREME COURT OF THE UNITED STATES

No. 161.—OCTOBER TERM, 1965.

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| Dora Surowitz, etc., Petitioner, | } On Writ of Certiorari | |
| v. | | to the United States |
| Hilton Hotels Corporation | | Court of Appeals for |
| et al. | | the Seventh Circuit. |

[March 7, 1966.]

MR. JUSTICE HARLAN, concurring.

Rule 23 (b) directs that in a derivative suit "the complaint shall be verified by oath" but nothing dictates that the verification be that of the plaintiff shareholder. See *Bosc v. 39 Broadway, Inc.*, 80 F. Supp. 825. In the present circumstances, it seems to me the affidavit of Walter J. Rockler, counsel for Mrs. Surowitz, amounts to an adequate verification by counsel, which I think is permitted by a reasonable interpretation of the Rule at least in cases such as this. On this premise, I agree with the decision of the Court.